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No. 02-479

In the Supreme Court of the United States

MEDICAL BOARD OF CALIFORNIA, PETITIONER

v.

MICHAEL J. HASON, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Eleventh Amendment bars suit under Title II of the Americans with Disabilities Act, 42 U.S.C. 12131-12165, against the California Medical Board for denial of a medical license based on the applicant's mental illness.

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Belanger v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993) 23

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City of Richmond v. *J.A. Croson Co.*, 488 U.S. 469 (1989) 6, 8
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Rhodes v. *Chapman*, 452 U.S. 337 (1981) 33
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Cases—Continued: Page

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Section 35.150(a)(1) 3
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Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* (Apr. 1989) 39
Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human Res., 101st Cong., 1st Sess. (1989) 26, 28, 34, 39, 40

Miscellaneous—Continued: Page

M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855 (1975) 19, 20
California Att'y Gen., *Commission on Disability: Final Report* (Dec. 1989) 23, 28, 29, 30, 39
Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 31
Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979) 31
Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. (1977) 31
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134 Cong. Rec. 9384-9385 (1988) 38
136 Cong. Rec. (1990):
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T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393 (1991) 20
Department of Health & Human Servs., *Visions of Independence, Productivity, Integration for People with Developmental Disabilities* (1990) 39
Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare, 93d Cong., 1st Sess. (1973):
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Employment Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunity of the House Comm. on Educ. & Labor, 99th Cong., 1st Sess. (1985) 40

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Enforcing the ADA: A Status Report from the Department of Justice <http://www.usdoj.gov/crt/ada>:
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Equal Access to Voting for Elderly & Disabled Persons: Hearing Before the Task Force on Elections of the House Comm. on House Admin., 98th Cong., 1st Sess. (1984) 25, 26
FEC, *Polling Place Accessibility in the 1998 General Election* (1989) 26
J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) 39, 40
GAO, *Briefing Report on Cost of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. (1990) 44
H.R. Rep. No. 439, 89th Cong., 1st Sess. (1965) 14
H.R. Rep. No. 485, 101st Cong., 2d Sess. (1990):
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The ICD Survey II: Employing Disabled Americans (1987) 18
Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary, 107th Cong., 1st Sess. (2001) 25
B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temp. L.Q. 1 (1986) 39, 40

Miscellaneous—Continued: Page

Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization* (Dec. 2, 2002) 21
National Council on the Handicapped:
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Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disablities (1986) 16
National Public Radio, *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (Dec. 2, 2002) 21
New Mexico, *Official 2002 General Election Results by Office* (Dec. 2002) 21
Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979) 19
P. Reilly, *The Surgical Solution* (1991) 21
Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988) 18
S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3 (1965) 14, 15
S. Rep. No. 415, 92d Cong., 1st Sess. (1971) 40
S. Rep. No. 116, 101st Cong., 1st Sess. (1989) ..... *passim*
J. Shapiro, *No Pity* (1994) 24, 30
Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* (Comm. Print 1990):
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Vol. 3 ..... *passim*
Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* (1990) 17, 18, 29, 44
United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983) ..... *passim*
Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary, 89th Cong., 1st Sess. (1965) 14

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OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1-13) is reported at 279 F.3d 1167. The opinion of the district court (Pet. App. 15-16) and recommendation of the magistrate judge (Pet. App. 17-25) are unreported.

JURISDICTION

The court of appeals entered its judgment on February 12, 2002. A petition for rehearing en banc was denied on June 26, 2002 (Pet. App. 26-36). The petition for a writ of certiorari was filed on September 23, 2002, and was granted, limited to Question 1, on November 18, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. *Statutory Framework*: The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segre-

> gation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). As a result, "people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally." 42 U.S.C. 12101(a)(6). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7).

Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case involves a suit filed under Title II. That Title provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its

components. 42 U.S.C. 12131(1)(A) and (B). The term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual"; "a record of such an impairment"; or "being regarded as having such an impairment." 42 U.S.C. 12102(2). A "qualified individual with a disability" is a person "who, with or without reasonable modifications * * * meets the essential eligibility requirements" for the governmental program or service. 42 U.S.C. 12131(2); 28 C.F.R. 35.140.[1]

The discrimination prohibited by Title II of the Disabilities Act includes, among other things, denying a government benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii). In addition, a public entity must make reasonable modifications in policies, practices, or procedures if the accommodation is necessary to avoid the exclusion of individuals with disabilities and can be accomplished without imposing an undue financial or administrative burden on the government, or fundamentally altering the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities," unless to do so would fundamentally alter the program or impose an undue financial or administrative burden. 28 C.F.R. 35.150(a). However, facilities altered or constructed after the effective date of the Act must be made accessible. 28 C.F.R. 35.150(a)(1), 35.151.

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[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on prior regulations promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. See 42 U.S.C. 12134.

Title II may be enforced through private suits against public entities. 42 U.S.C. 12133. Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202.

2. *Factual and Procedural Background*: In early 1995, respondent Hason applied to petitioner for a license to practice medicine in California. Petitioner rejected Hason's application for reasons of mental illness. Pet. App. 3. Hason filed a pro se complaint in federal court in which he alleged that the denial of the license on the basis of mental illness violated, *inter alia*, Title II of the Disabilities Act. *Id.* at 3-4. The complaint named petitioner, the California Department of Consumer Affairs, the State of California, and twenty state officials, in their official and individual capacities, as defendants, and sought both damages and injunctive relief. *Id.* at 4, 26-27, 54-55. The district court dismissed Hason's complaint with prejudice. *Id.* at 14-15.

The court of appeals reversed. Pet. App. 1-13. As relevant here, adhering to circuit precedent, the court held that the abrogation of Eleventh Amendment immunity for Title II of the Disabilities Act was a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment. *Id.* at 5-6 (citing *Dare* v. *California*, 191 F.3d 1167 (9th Cir. 1999), cert. denied, 531 U.S. 1190 (2001), and *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), cert. denied, 524 U.S. 937 (1998)).

Only one of those state defendants, the Medical Board of California, petitioned this Court for a writ of certiorari. This Court granted the petition, limited to the Eleventh Amendment question, and simultaneously granted the United States' motion to intervene, pursuant to 28 U.S.C. 2403, to defend the constitutionality of Title II's abrogation of immunity.[2]

[2] The United States takes no position on the merits of Hason's claims.

SUMMARY OF ARGUMENT

Application of Title II of the Americans with Disabilities Act to States and their subdivisions falls squarely within Congress's comprehensive legislative power under Section 5 of the Fourteenth Amendment to prohibit, remedy, and prevent violations of the rights secured by that Amendment. In enacting Title II, Congress focused its legislative attention on the specific problem of discriminatory access to state and local government services; it did not simply extend a policy focused on the private sector to the government. After decades of legislative experience in the field, years of hearings and study, countless submissions and testimonials by citizens across the Nation, and thoroughgoing congressional review, Congress determined that persons with disabilities had suffered from a virulent history of official governmental discrimination, isolation, and segregation. Congress found, moreover, that such discrimination and segregation, like race and gender discrimination, had repercussions that have persisted over the years and that continued to be manifested in decisionmaking by state and local government officials across the span of governmental operations. That official discrimination results not just in the denial of the equal protection of the laws and equal access to governmental benefits, but also in the deprivation of fundamental rights, such as voting, access to the courts, substantive and procedural due process, the ability to petition government officials, and Fourth and Eighth Amendment protections.

In Title II, Congress formulated a statute that, much like federal laws combating racial and gender discrimination, is carefully designed to root out present instances of unconstitutional discrimination, to undo the effects of past discrimination, and to prevent future unconstitutional treatment by prohibiting discrimination and promoting integration where reasonable. At the same time, the Disabilities Act preserves the latitude and flexibility States legitimately

require in the administration of their programs and services. The Disabilities Act accomplishes those objectives by requiring States to afford persons with disabilities genuinely equal access to services and programs, while at the same time confining the statute's protections to "qualified individual[s]," who by definition meet all of the States' legitimate and essential eligibility requirements. The Act simply requires "reasonable" modifications for individuals with disabilities that do not impose an undue burden and do not fundamentally alter the nature or character of the governmental program. The statute is thus carefully tailored to prohibit only state conduct that presents a substantial risk of violating the Constitution or that unreasonably perpetuates the exclusionary effects of the prior unconstitutional isolation and broad denial of rights of persons with disabilities.

ARGUMENT

BECAUSE IT COMBATS AN ENDURING PROBLEM OF UNCONSTITUTIONAL MISTREATMENT AND DISCRIMINATION AGAINST INDIVIDUALS WITH DISABILITIES, TITLE II OF THE AMERICANS WITH DISABILITIES ACT IS VALID SECTION 5 LEGISLATION

Section 5 of the Fourteenth Amendment is an affirmative grant of legislative power to Congress, see *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 80 (2000), that gives Congress the "authority both to remedy and to deter violation of [Fourteenth Amendment] rights * * * by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text." *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001); see also *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 488 (1989) (opinion of O'Connor, J.) ("[I]n no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress" when enforcing the Fourteenth Amendment.) (citation & emphasis omitted). Section 5 thus "gives Congress broad power in-

deed," *Saenz* v. *Roe*, 526 U.S. 489, 508 (1999) (citation omitted), including the power to abrogate the States' Eleventh Amendment immunity, *Garrett*, 531 U.S. at 364.

Although Section 5 empowers Congress to enact prophylactic and remedial legislation to enforce Fourteenth Amendment rights, it also requires a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997). Title II of the Disabilities Act is appropriate Section 5 legislation because it responds to a history of pervasive discrimination and deprivation of constitutional rights by States, which has spawned continuing discrimination and the denial of rights in the daily decisions of officials, and because the legislation is reasonably designed to prevent and remedy those constitutional violations.

Petitioner suggests that this Court (Br. 14-16) should focus not on Title II's overall propriety as Section 5 legislation, but instead should independently analyze whether Congress's inclusion of licensing—even more narrowly, "professional and vocational" licensing (*id.* at 14)—in Title II was appropriate. While Congress's inclusion of licensing is supported by the legislative record (see Section B(2)(b)(ix), *infra*), petitioner's proposed mode of analysis is fundamentally flawed.

First, Petitioner's context-specific approach is unprecedented. In the past, this Court has analyzed whether Congress has the authority to apply to the States a statute as a whole, *Flores*, *supra*, a specific Title of a statute, *Garrett*, *supra*, or a specific Section of a statute, *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). But in no case has this Court required Congress to justify the application of an intentionally comprehensive statutory provision to every potential context. In fact, the Court took a different tack in *City of Rome* v. *United States*, 446 U.S. 156 (1980), in upholding the application of voting preclearance requirements

to cities where no discriminatory purpose underlay their adoption of an electoral system, *id.* at 172, even if the city "has been innocent of any wrongdoing for the last 17 years," *id.* at 190 (Stevens, J., concurring); see also *Gaston County* v. *United States*, 395 U.S. 285 (1969).

Second, petitioner's approach is at odds with this Court's congruence and proportionality test for evaluating Section 5 legislation. Congruence and proportionality analysis necessarily entails looking at a statutory provision's operation and coverage as a whole, and measuring it against the predicate for congressional action as a whole. Where the necessary predicate for congressional action lies, Congress "must have wide latitude in determining" the proper means of enforcing the right. *Flores*, 521 U.S. at 519-520; see also *South Carolina*, *supra*. That includes allowing Congress to legislate based on commonsense conclusions about the scope of a problem and to enact prophylactic legislation designed to remedy difficult-to-detect discrimination and to prevent the expansion of unconstitutional treatment into new areas. See *Croson*, 488 U.S. at 490 (opinion of O'Connor, J.) (Congress's Section 5 power "include[s] the power to define situations which *Congress* determines threaten principles of equality and to adopt prophylactic rules to deal with those situations").[3]

Thus, contrary to petitioner's argument, the congruence and proportionality test is not a license for judicial micromanagement of every potential application of a law. Title VII, 42 U.S.C. 2000e *et seq.*, for example, prohibits sex and race discrimination in the administration of any and all employment terms, conditions, and benefits; yet, this Court has never insisted that Congress justify its prohibitions application-by-application with a lengthy, documented re-

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[3] See also *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (upholding a nationwide ban on literacy tests and residency requirements despite the geographically limited evidence of abuse).

cord of particularized state discrimination. That is for the commonsense reason that discrimination, by its nature, does not operate in isolated compartments. The same mindset that presumes that persons with disabilities cannot be educated, should not vote, are too much trouble to transport, and are not part of the community served by public programs and benefits, will not arbitrarily disappear in the field of licensing decisions.

A. Title II Of The Disabilities Act Is Valid Section 5 Legislation Because It Targets Distinctly Governmental Activities That Often Burden Fundamental Rights

In *Garrett*, *supra*, this Court held that Title I of the Disabilities Act, 42 U.S.C. 12111-12117, which prohibits public and private employers from discriminating in employment on the basis of disability, was not valid Section 5 legislation. The arguments of petitioner and its amicus largely assume that the invalidity of Title II's abrogation follows ineluctably from *Garrett*. See Pet. Br. 11; Va. Amicus Br. 6, 10-11. But, if Titles I and II were constitutionally indistinguishable, this Could would have had no reason to limit its holding in *Garrett*, 531 U.S. at 360 n.1. Moreover, petitioner's argument overlooks three critical distinctions between the two Titles.

First, in enacting Title I, Congress simply included States as employers within a general ban on employment discrimination by private employers, without considering sufficiently whether there was a distinctive problem of unconstitutional employment discrimination by the States. *Garrett*, 531 U.S. at 369-371.[4] Title II, by contrast, is a law that

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[4] In other recent federalism cases, Congress likewise sought to "place States on the same footing as private parties." *Kimel*, 528 U.S. at 82 (citation omitted); see *Alden* v. *Maine*, 527 U.S. 706 (1999) (Fair Labor Standards Act of 1968); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 631-632 (1999) (patent infringe-

Congress enacted specifically and deliberately to regulate the conduct of state and local governments *qua governments*. Congress thus was singularly focused on the historic and enduring problem of official discrimination and unconstitutional treatment on the basis of disability by "any State or local government," 42 U.S.C. 12131(1)(A) and (B).

For that reason, as *Garrett* acknowledged, Title II is predicated on a more substantial legislative record pertaining to "discrimination by the States in the provision of public services." 531 U.S. at 371 n.7; see also Section B(2) and (3), *infra*. That legislative record, in turn, led Congress to make specific findings about the historic and enduring problem of discrimination by States and their subdivisions. Contrast *Garrett*, 531 U.S. at 371 (no findings about state employment discrimination). In particular, Congress found that "discrimination against individuals with disabilities persists in such critical areas as * * * education, transportation, * * * institutionalization, * * * voting, and access to public services." 42 U.S.C. 12101(a)(3). Those are areas for which States and their subdivisions are either exclusively or predominantly responsible. And the same Committee Reports that the Court in *Garrett* found lacking with regard to public employment, 531 U.S. at 371-372, are directly on point here, declaring that "there exists a compelling need to establish a clear and comprehensive Federal prohibition of discrimination on the basis of disability in the area[] of * * * public services." H.R. Rep. No. 485, 101st Cong., 2d Sess. Pt. 2, at 28 (1990); see also S. Rep. No. 116, 101st Cong., 1st Sess. 6 (1989) ("Discrimination still persists in such critical areas as * * * public services.").

Congress thus specifically concluded, on the basis of a weighty legislative record, that States were contributors to the "history of purposeful unequal treatment" and partici-

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ment); *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (Lanham Act liability).

pants in "the continuing existence of unfair and unnecessary discrimination and prejudice" against individuals with disabilities, 42 U.S.C. 12101(a)(7) and (9). When Congress focuses in that manner on the problem of unconstitutional conduct by States and their subdivisions and determines that "legislation is needed to secure the guarantees of the Fourteenth Amendment," Congress's "conclusions are entitled to much deference." *Kimel*, 528 U.S. at 81 (citation omitted).

Second, because Title I pertains only to employment, decisions made by state employers concerning individuals with disabilities implicate only the Equal Protection Clause's guarantee against irrational employment decisions. *Garrett*, 531 U.S. at 366-368. Like *Flores*, 521 U.S. at 512-514, and *Kimel*, 528 U.S. at 83, Title I thus addressed state conduct in an area where the States, as sovereigns, are given an extraordinarily wide berth and constitutional violations are infrequently found.

Title II, by contrast, enforces not only the Equal Protection Clause, but also a wide array of fundamental constitutional rights—the right to petition the government, the right of access to the courts, the right to vote, Fourth and Eighth Amendment protections, and procedural and substantive due process. Indeed, Title I dealt only with the States' denial of an opportunity—state employment—to individuals who equally could pursue employment in the private sector. Title II, by contrast, regulates state and local governments when they intervene in and regulate the activities of private citizens, or deprive them of their liberty, property, or parental rights. Title II also regulates a State's ability to deny a class of citizens access to government services upon which all citizens must rely for basic opportunities (and sometimes the necessities) of modern life. The private sector cannot provide medical licenses, or the ability to cast a ballot, file a lawsuit, secure the protection of the police, or seek the enactment of legislation. Title II thus

legislates in an area where the States' conduct often is subject to heightened scrutiny, and where their ability to infringe those rights generally, let alone to deny them disparately to one particular segment of the population based on stereotypes, fears, economics, or administrative convenience, is constitutionally curtailed.

Third, unlike *Kimel* and *Garrett*, this case potentially implicates concerns beyond abrogation and the ability of individuals to sue the States for money damages. Because both *Kimel* and *Garrett* targeted *employment* discrimination, those decisions only invalidated the statutes' abrogation provisions; the substantive prohibitions of those laws remain applicable to the States under Congress's Commerce Clause power and can be enforced against state officials under *Ex parte Young*, 209 U.S. 123 (1908). See *Garrett*, 531 U.S. at 374 n.9; *EEOC* v. *Wyoming*, 460 U.S. 226, 235-243 (1983). While petitioner now concedes that Title II's substantive provisions are valid Commerce Clause legislation (Br. 5), that was not its position below (Pet. Supp. C.A. Br. 26, 28). Nor is it the position of other States, who have emphasized Title II's coverage of public services and operations regardless of their nexus to commerce, and its direct regulation of the government *qua* government.[5] Accordingly, unless Title II is appropriate Commerce Clause legislation, this case implicates concerns well beyond the narrow question of abrogation in licensing cases.

For all of those reasons, and especially because this case may implicate the constitutional authority for enactment of Title II's substantive prohibitions as applied to all levels of government, this Court is not constrained, as it was in *Garrett*, to consider only the legislative evidence of uncon-

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[5] See *Thompson* v. *Colorado*, 278 F.3d 1020, 1025 n.2 (10th Cir. 2001), cert. denied, 122 S. Ct. 1960 (2002); *Florida* v. *Rendon*, 832 So. 2d 141, 146 n.5 (Fla. Dist. Ct. App. 2002); *Meyers* v. *Texas*, No. 02-50452 (5th Cir.) (pending).

stitutional conduct by the States. When Congress specifically focuses the substantive provisions of Section 5 legislation jointly on the operations of state and local governments *qua* governments, its enforcement powers under Section 5, like the substantive protections of Section 1, can charge the States with some responsibility for the unconstitutional conduct of the subdivisions of government that the States themselves create and empower to act.[6] That is, in part, because the line between state and local government is much harder to discern in the context of public services than it is in employment.

While state and local employment decisions can be made independently, the operations of state and local governments in the provision of government services, such as voting, education, welfare benefits, zoning, licensing, and the administration of justice are often inextricably intertwined. In education, for example, the State plays a substantial role in directing, supervising and limiting the discretion of local agencies, either by administrative supervision or by statutory direction. The complexity of the relationship between state and local governments in the administration of public services often raises difficult, state-by-state questions regarding whether a particular entity is operating as an "arm of the state." In some cases, the local government officials act at the direct behest of the State government pursuant to State mandates. And in all cases, the local government is able to discriminate only because it exercises power delegated to it by the State. The record of historic and pervasive discrimination and unconstitutional treatment by all levels of government further blurs the line between state and local governmental action, because the conduct of local officials is traceable, at least in part, to the rules of

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[6] See *Atkin* v. *Kansas*, 191 U.S. 207, 220-221 (1903); see also *Lawrence County* v. *Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 270-271 (1985) (Rehnquist, J., dissenting).

state-mandated discrimination and segregation under which they operated for years.

Indeed, under similar circumstances, this Court has recognized the relevance of local governmental conduct in assessing the validity of Section 5 legislation as applied to the States. In *Garrett*, the Court cited the substantive provisions of the Voting Rights Act of 1965, which were upheld in *South Carolina*, *supra*, as "appropriate" Section 5 legislation regulating the States because the Act was predicated upon a documented "problem of racial discrimination in voting." *Garrett*, 531 U.S. at 373 (citing 383 U.S. at 312-313). Much of the evidence of unconstitutional conduct described in *South Carolina*, 383 U.S. at 312-314, however, involved the conduct of *county* and *city* officials.[7] Indeed, almost all of the evidence of specific instances of discrimination underlying the Voting Rights Act of 1965 concerned local officials rather than state officials; the rest of the evidence was either statistical evidence or lists of state laws.[8] See

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[7] See 383 U.S. at 312 n.12 (discussing discrimination by Montgomery County Registrar); *id.* at 312 n.13 (discussing discrimination by Panola County registrar and Forrest County registrar); *id.* at 313 n.14 (citing a case that documents discrimination by the Dallas County Board of Registrars); *id.* at 313 n.15 (citing a case that documents discrimination by the Walker County registrar); *id.* at 314 ("certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls"); *id.* at 314-315 (discussing discrimination in Selma, Alabama and Dallas County).

[8] See, *e.g.*, *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 5-8 (1965) (extensive voting discrimination by local officials in Selma, Alabama, and Dallas County); *id.* at 8 (local sheriff and deputy sheriff in Mississippi beat three black men when they attempted to register to vote); *id.* at 36 (21 of 22 voting discrimination lawsuits filed by the Department of Justice in Mississippi were against counties); *Voting Rights: Hearings Before the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess. 12 (1965) (discrimination in Clarke County, Mississippi, and Wilcox County, Alabama); H.R. Rep. No. 439, 89th Cong., 1st Sess. 16 (1965) (resistance of parish registrars to registration of black citizens); S. Rep. No. 162, 89th Cong., 1st Sess. Pt. 3, at 7-9 (1965) (discrimination and litigation in Dallas County,

also *Flores*, 521 U.S. at 530-531 (in analyzing Section 5 as a source of power for substantive provisions of a law, the Court did not distinguish between evidence of state and local governmental conduct). In sum, while Congress compiled ample evidence of unconstitutional conduct by the States themselves in enacting Title II, the constitutional question presented here, unlike *Garrett*, compels consideration of the evidence of local government discrimination as well.

B. After An Exhaustive Investigation, Congress Found Ample Evidence Of A Long History And A Continuing Problem Of Unconstitutional Treatment Of Individuals With Disabilities

Petitioner insists that "nothing in the legislative record underlying enactment of [Title II] shows evidence of invidious discrimination by States against persons with disabilities in *any* activity undertaken by States." Pet. Br. 18; see also Va. Amicus Br. 10. That argument is profoundly mistaken.

1. Congress Exhaustively Investigated Governmental Discrimination On The Basis Of Disability

Congress's "special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue." *Fullilove* v. *Klutznick*, 448 U.S. 448, 502-503 (1980) (Powell, J., concurring). Indeed, in *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), this Court acknowledged the superior expertise of legislatures in addressing the problem of disability discrimination. *Id.* at 445. "One appropriate source" of evidence for Congress to consider in combating disability discrimination

> is the information and expertise that Congress acquires in the consideration and enactment of earlier legislation. After Congress has legislated repeatedly in an area of

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Alabama); *id.* at 12 (counties' discriminatory use of "good moral character" test); *id.* at 33 (county officials' discriminatory use of poll tax).

> national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area.

Fullilove, 448 U.S. at 503 (Powell, J., concurring); see also *South Carolina*, 383 U.S. at 330 ("In identifying past evils, Congress obviously may avail itself of information from any probative source.").

The Congress that enacted Title II of the Disabilities Act brought to that legislative process more than forty years of experience studying the scope and nature of discrimination against persons with disabilities and testing incremental legislative steps to combat that discrimination. See *Garrett*, 531 U.S. at 390-391 (Breyer, J., dissenting) (listing prior legislation). Building on that expertise, Congress commissioned two reports from the National Council on the Handicapped, an independent federal agency, to report on the adequacy of existing federal laws and programs addressing discrimination against persons with disabilities.[9] That study revealed that "the most pervasive and recurrent problem faced by disabled persons appeared to be unfair and unnecessary discrimination." National Council on the Handicapped, *On the Threshold of Independence* 2 (1988) (*Threshold*); see National Council on the Handicapped, *Toward Independence: An Assessment of Federal Laws and Programs Affecting Persons with Disabilities* (1986). Persons with disabilities reported "denials of educational opportunities, lack of access to public buildings and public bathrooms, [and] the absence of accessible transportation." *Threshold* 20-21, 41. Congress also learned of an "alarming rate of poverty," a dramatic educational gap, a "Great Divide" in employment,

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[9] See Rehabilitation Amendments of 1984, Pub. L. No. 98-221, Title I, § 141(a), 98 Stat. 26; Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Title V, § 502(b), 100 Stat. 1829.

and a life of social "isolat[ion]" for persons with disabilities. *Id.* at 14.[10]

Congress itself engaged in extensive study and fact-finding concerning the problem of discrimination against persons with disabilities, holding 13 hearings devoted specifically to consideration of the Disabilities Act. See *Garrett*, 531 U.S. at 389-390 (Breyer, J., dissenting) (listing hearings). In addition, a congressionally designated Task Force held 63 public forums across the country that were attended by more than 30,000 individuals. Task Force on the Rights and Empowerment of Americans with Disabilities, *From ADA to Empowerment* 16 (1990) (*Task Force Report*). The Task Force also presented to Congress evidence submitted by nearly 5,000 individuals documenting the problems with discrimination persons with disabilities face daily—often at the hands of state and local governments. See 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legislative History of Pub. L. No. 101-336: The Americans with Disabilities Act* 1040 (Comm. Print 1990) (*Leg. Hist.*).[11]

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[10] Twenty percent of persons with disabilities—more than twice the percentage for the general population—lived below the poverty line, and 15% of disabled persons had incomes of $15,000 or less. *Threshold* 13-14. Forty percent of persons with disabilities—triple the rate for the general population—did not finish high school. Only 29% of persons with disabilities had some college education, compared with 48% for the general population. *Id.* at 14. Two-thirds of all working-age persons with disabilities were unemployed; only one in four worked full-time. *Ibid.* Two-thirds of persons with disabilities had not attended a movie or sporting event in the past year; three-fourths had not seen live theater or music performances; persons with disabilities were three times more likely not to eat in restaurants; and 13% of persons with disabilities never go to grocery stores. *Id.* at 16-17.

[11] See also *Task Force Report* 16. The Task Force submitted those "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" to Congress, 2 *Leg. Hist.* 1324-1325, as part of the official legislative history of the Disabilities Act. See *id.* at 1336, 1389. In *Garrett*, the United States lodged with the Clerk a complete set of those submissions. See 531 U.S. at 391-424 (Breyer, J., dissenting). Those submissions are cited herein by reference to the State and

Congress also considered several reports and surveys. See S. Rep. No. 116, *supra*, at 6; H.R. Rep. No. 485, *supra*, Pt. 2, at 28; *Task Force Report* 16.[12]

2. Congress Amassed Voluminous Evidence Of Historic And Enduring Discrimination And Deprivation Of Fundamental Rights By States

a. *Historic Discrimination*: The "propriety of any § 5 legislation 'must be judged with reference to the historical experience . . . it reflects.'" *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627, 640 (1999) (quoting *Flores*, 521 U.S. at 525). While petitioner and its amicus ignore it, Congress and this Court have long acknowledged the Nation's "history of unfair and often grotesque mistreatment'" of persons with disabilities. *Cleburne*, 473 U.S. at 454 (Stevens, J., concurring); see also *Olmstead* v. *L.C.*, 527 U.S. 581, 608 (1999) (Kennedy, J., concurring) ("[O]f course, persons with mental disabilities have been subject to historic mistreatment, indifference, and hostility."); *Alexander* v. *Choate*, 469 U.S. 287, 295 n.12 (1985) ("well-cataloged instances of invidious discrimination against the handicapped do exist").

"[T]orture, imprisonment, and execution of handicapped people throughout history are not uncommon." United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 18 n.5 (1983) (*Spectrum*). More often, "societal practices of isolation and segregation have been the

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Bates stamp number, which is how the submissions were lodged in *Garrett*.

[12] Those included the United States Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* (1983); two polls conducted by Louis Harris & Assocs., *The ICD Survey of Disabled Americans: Bringing Disabled Americans into the Mainstream* (1986), and Louis Harris & Assocs., *The ICD Survey II: Employing Disabled Americans* (1987); a report by the Presidential Commission on the Human Immunodeficiency Virus Epidemic (1988); and eleven interim reports submitted by the Task Force.

rule." *Ibid.* From the 1920s to the 1960s, the eugenics movement labeled persons with mental and physical disabilities as "sub-human creatures" and "waste products" responsible for poverty and crime. *Id.* at 20. Every single State, by law, provided for the segregation of persons with mental disabilities and, frequently, epilepsy, and excluded them from public schools and other state services and privileges of citizenship.[13] States also fueled the fear and isolation of persons with disabilities by requiring public officials and parents, sometimes at risk of criminal prosecution, to report and segregate into institutions the "feebleminded."[14]

Almost every State accompanied forced segregation with compulsory sterilization and prohibitions of marriage. See *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("It is better for all the world, if * * * society can prevent those who are manifestly unfit from continuing their kind. * * * Three generations of imbeciles are enough."); 3 *Leg. Hist.* 2242 (James Ellis); M. Burgdorf & R. Burgdorf, *A History of Unequal Treatment*, 15 Santa Clara Lawyer 855, 887-888 (1975) (*Unequal Treatment*). Children with mental disabilities "were excluded completely from any form of public education." *Board of Educ.* v. *Rowley*, 458 U.S. 176, 191 (1982). Numerous States also restricted the rights of physically disabled people to enter into contracts, *Spectrum* 40, while a number of large cities enacted "ugly laws," which prohibited the physically disabled from appearing in public. Chicago's law provided:

> No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting ob-

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[13] See People First Amicus Br., App. A, *Alsbrook* v. *City of Maumelle*, No. 99-423 (*Compendium of State Laws*); see also Note, *Mental Disability and the Right to Vote*, 88 Yale L.J. 1644 (1979).

[14] *Spectrum* 20, 33-34; *Compendium of State Laws* A5, A21-A22, A25, A28-A29, A40, A44, A46-A49, A50-A51, A56, A61-A63, A65-A66, A71, A74-A75.

> ject or improper person to be allowed in or on the public ways or other public places in this city, shall therein or thereon expose himself to public view, under a penalty of not less than one dollar nor more than fifty dollars for each offense.

Unequal Treatment 863 (quoting ordinance). Such laws were enforced as recently as 1974. *Id.* at 864.[15]

b. *Enduring Discrimination and Deprivation of Fundamental Rights*: "Prejudice, once let loose, is not easily cabined," whether based on race, sex, or disability. *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). Indeed, Congress specifically found that "our society is still infected by the ancient, now almost subconscious assumption that people with disabilities are less than fully human and therefore are not fully eligible for the opportunities, services, and support systems which are available to other people as a matter of right. The result is massive, society-wide discrimination." S. Rep. No. 116, *supra*, at 8-9.[16]

That is because the process of changing discriminatory laws, policies, practices, and stereotypical conceptions and prejudices did not even *begin* until the 1970s and 1980s. Even then, "out-dated statutes [were] still on the books, and

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[15] See also *State* v. *Board of Educ.*, 172 N.W. 153, 154 (Wis. 1919) (approving exclusion of a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children") (noted at 3 *Leg. Hist.* 2243); see generally T. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399-407 (1991).

[16] See also 3 *Leg. Hist.* 2020 (Att'y Gen. Thornburgh) ("But persons with disabilities are all too often not allowed to participate because of stereotypical notions held by others in society—notions that have, in large measure, been created by ignorance and maintained by fear."); 2 *Leg. Hist.* 1606 (Arlene Mayerson) ("Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.").

irrational fears or ignorance, *traceable to the prolonged social and cultural isolation*" of those with disabilities "continue to stymie recognition of the[ir] dignity and individuality." *Cleburne*, 473 U.S. at 467 (Marshall, J., concurring) (emphasis added). The involuntary sterilization of the disabled is not distant history; it continued into the 1970s, and occasionally even into the 1980s—well within the lifetime of many current governmental decisionmakers. P. Reilly, *The Surgical Solution* 2, 148 (1991); National Public Radio, *Look Back at Oregon's History of Sterilizing Residents of State Institutions* (Dec. 2, 2002). As recently as 1983, fifteen States continued to have compulsory sterilization laws on the books. *Spectrum* 37; see also *Stump* v. *Sparkman*, 435 U.S. 349, 351 (1978) (Indiana judge ordered the sterilization of a "somewhat retarded" 15 year old girl); Reilly, *supra*, at 148-160.

Until the late 1970s, "peonage was a common practice in [Oregon] institutions." Governor J. Kitzhaber, *Proclamation of Human Rights Day, and Apology for Oregon's Forced Sterilization* (Dec. 2, 2002). As of 1979, "most States still categorically disqualified 'idiots' from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials." *Cleburne*, 473 U.S. at 464 (Marshall, J., concurring). New Mexico recently reaffirmed its unqualified exclusion of "idiots [and] insane persons" from voting. New Mexico, *Official 2002 General Election Results by Office* (Dec. 2002).

Based on the evidence it amassed, Congress found, as a matter of present reality and historical fact, that persons with disabilities have been and are subjected to "widespread and persisting deprivation of [their] constitutional rights." *Florida Prepaid*, 527 U.S. at 645 (citation omitted); see also 42 U.S.C. 12101(a)(2) and (3). In particular, Congress discerned a substantial risk that persons with disabilities will be unconstitutionally denied an equal opportunity to obtain vital services and to exercise fundamental rights, and will be

subjected to unconstitutional treatment in the form of arbitrary or irrational distinctions and exclusions, and disparity in treatment as compared to other similarly situated groups, *Garrett*, 531 U.S. at 366 n.4.

(1) Education: "[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, where the State provides a public education, that right "must be made available to all on equal terms." *Ibid.* But Congress learned that irrational prejudices, fears, ignorance, and animus still operate to deny persons with disabilities an equal opportunity for public education. As recently as 1975, approximately 1 million disabled students were "excluded entirely from the public school system." 42 U.S.C. 1400(c)(2)(C). A quadriplegic woman with cerebral palsy and a high intellect, who scored well in school, was branded "retarded" by educators, denied placement in a regular school setting, and placed with emotionally disturbed children, where she was told she was "not college material." VT 1635. Other school districts also simply labeled as mentally retarded a blind child and a child with cerebral palsy. NB. 1031; AK 38 (child with cerebral palsy subsequently obtained a Masters Degree). "When I was 5," another witness testified, "my mother proudly pushed my wheelchair to our local public school, where I was promptly refused admission because the principal ruled that I was a fire hazard." S. Rep. No. 116, *supra*, at 7.[17]

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[17] See also 136 Cong. Rec. 10913 (1990) (Rep. McDermott) (school board excluded Ryan White, who had AIDS, not because the board "thought Ryan would infect the others" but because "some parents were afraid he would"); UT 1556 (disabled student refused admission to first grade because teacher refused to teach student with a disability); NY 1123 (three elementary schools had practice of locking mentally disabled children in a 3'x 3'x 7' box for punishment); *Spectrum* 28, 29 ("a great

Indeed, while petitioner categorically denies (Br. 18) any discrimination, on the eve of Title II's enactment, the California Attorney General reported that, in California schools (which are arms of the state, *Belanger* v. *Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992), cert. denied, 507 U.S. 919 (1993)), "[a] bright child with cerebral palsy is assigned to a class with mentally retarded and other developmentally disabled children solely because of her physical disability," and that, in one town, all children with disabilities are grouped into a single classroom regardless of individual ability. California Att'y Gen., *Commission on Disability: Final Report* 17, 81 (Dec. 1989) (*Cal. Report*).

State institutions of higher education acted on the same stereotypes and prejudices. Indeed, the "higher one goes on the education scale, the lower the proportion of handicapped people one finds." *Spectrum* 28; see also note 10, *supra*. A person with epilepsy was asked to leave a state college because her seizures were "disrupt[ive]" and, officials said, created a risk of liability. 2 *Leg. Hist.* 1162 (Barbara Waters). A doctor with multiple sclerosis was denied admission to a psychiatric residency program because the state admissions committee "feared the negative reactions of patients to his disability." *Id.* at 1617 (Arlene Mayerson). Another witness explained that, "when I was first injured,

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many handicapped children" are "excluded from the public schools" or denied "recreational, athletic, and extracurricular activities provided for non-handicapped students"); *Education for All Handicapped Children, 1973-1974: Hearings Before the Subcomm. on the Handicapped of the Senate Comm. on Labor & Pub. Welfare*, 93d Cong., 1st Sess. Pt. 2, at 793 (1973) (Christine Griffith) (first-grade student "was spanked every day" because her deafness prevented her from following instructions); *id.* Pt. 1, at 400 (Mrs. R. Walbridge) (student with spina bifida barred from the school library for two years "because her braces and crutches made too much noise"). For additional examples, see *id.* at 384 (Peter Hickey); 2 *Leg. Hist.* 989 (Mary Ella Linden); PA 1432; NM 1090; OR 1375; AL 82; SD 1481; MO 1014; NC 1144; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

my college refused to readmit me" because "it would be 'disgusting' to my roommates to have to live with a woman with a disability." WA 1733. Similarly, an Education student was denied a student teaching assignment because administrators thought the students would react badly to her appearance. OR 1384.[18]

For both good and ill, "the law can be a teacher." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). As with race discrimination, few governmental messages more profoundly affect individuals and their communities than the message that individuals with disabilities should be segregated in education:

> Segregation in education impacts on segregation throughout the community. Generations of citizens attend school with no opportunity to be a friend with persons with disabilities, to grow together, to develop an awareness of capabilities—all in the name of benevolence! Awareness deficits in our young people who become our community leaders and employers perpetuate the discrimination fostered in the segregated educational system.

MO 1007 (Pat Jones).

(ii) Voting: Because "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the

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[18] See also 2 *Leg. Hist.* 1224 (Denise Karuth) (state university professor asked a blind student enrolled in his music class "What are you doing in this program if you can't see"; student was forced to drop class); *id.* at 1225 (state commission refuses to sponsor legally blind student for masters degree in rehabilitation counseling because "the State would not hire blind rehabilitation counselors, '[s]ince,' and this is a quote: 'they could not drive to see their clients'"); J. Shapiro, *No Pity* 45 (1993) (Dean of the University of California at Berkeley told a prospective student that "[w]e've tried cripples before and it didn't work"). For additional examples, see SD 1476; LA 999; MO 1010; WIS 1757; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting); *Cal. Report* 138; Appendix A, *infra*.

right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds* v. *Sims*, 377 U.S. 533, 561-562 (1964). But Congress found that persons with disabilities have been "relegated to a position of political powerlessness," 42 U.S.C. 12101(a)(7), and continue to be subjected to discrimination in voting, 42 U.S.C. 12101(a)(3). Congress made that finding after hearing that "people with disabilities have been turned away from the polling places after they have been registered to vote because they did not *look* competent." 2 *Leg. Hist.* 1220 (Nancy Husted-Jensen) (emphasis added). When one witness turned in the registration card of a voter who has cerebral palsy and is blind, the "clerk of the board of canvassers looked aghast * * * and said to me, 'Is that person competent? Look at that signature,'" and then invented a reason to reject the registration. *Id.* at 1219. A deaf voter was told that "you still have to be able to use your voice" to vote. *Equal Access to Voting for Elderly & Disabled Persons: Hearings Before the Task Force on Elections of the House Comm. on House Admin.*, 98th Cong., 1st Sess. 94 (1984) (*Equal Voting Hearings*).[19]

The legislative record also documented that many persons with disabilities "cannot exercise one of your most basic

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[19] One voter with a disability was "told to go home once when I came to the poll and found the voting machines down a flight of stairs with no paper ballots available"; on another occasion that voter "had to shout my choice of candidates over the noise of a crowd to a precinct judge who pushed the levers of the machine for me, feeling all the while as if I had to offer an explanation for my decisions." *Equal Voting Hearings* 45. "A blind woman, a new resident of Alabama, went to vote and was refused instructions on the operation of the voting machine." AL 16; see also *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); *Help America Vote Act of 2001: Hearing Before the House Comm. on the Judiciary*, 107th Cong., 1st Sess. 13 (2001) (James Dickson) ("I am blind, and I have never cast a secret ballot."); *id.* at 15 ("Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. * * * [T]o this day I really do not know if they cast my ballot according to my wishes.").

rights as an American" because polling places or voting machines are inaccessible. S. Rep. No. 116, *supra*, at 12. As a consequence, persons with disabilities "were forced to vote by absentee ballot before key debates by the candidates were held." *Ibid.*; see also *Americans with Disabilities Act 1989: Hearings on S. 933 Before the Subcomm. on the Handicapped and the Senate Comm. on Labor & Human Res.*, 101st Cong., 1st Sess. 76 (1989) (*May 1989 Hearings*) (Ill. Att'y Gen. Hartigan) (same). Voting by absentee ballot also "deprives the disabled voter of an option available to other absentee voters, the right to change their vote by appearing personally at the polls on election day." 2 *Leg. Hist.* 1745 (Nanette Bowling).[20] "How can disabled people have clout with our elected officials when they are aware that many of us are prevented from voting?" ARK 155.

(iii) Access to the courts: The Fourteenth Amendment protects the rights of civil litigants, criminal defendants, and members of the public to have access to the courts. See, *e.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980). Yet Congress learned that "[t]he courthouse door is still closed to Americans with disabilities"—literally. 2 *Leg. Hist.* 936 (Sen. Harkin).

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my

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[20] See also *Equal Voting Hearings* 17, 461 (criticizing States' imposition of special absentee voting requirements on persons with disabilities). For examples of inaccessible polling places, see 2 *Leg. Hist.* 1767 (Rick Edwards); WIS 1756; MT 1024, 1026-1027; MI 922; ND 1185; DE 307; WIS 1756; AL 16; *Garrett*, 531 U.S. at 395-424 (Breyer, J., dissenting); FEC, *Polling Place Accessibility in the 1988 General Election* 7 (1989) (21% of polling places inaccessible; 27% were inaccessible in 1986 elections).

> arrival so that somebody would come and open the door and maybe let me in. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1070-1071 (Emeka Nwojke). Such differential treatment affects not only the ability to get into the courthouse, but also the ability to be heard and participate effectively and meaningfully in judicial proceedings.[21]

(iv) Access to government officials and proceedings "The very idea of a government, republican in form, implies a right on the part of its citizens to * * * petition for a redress of grievances," *United States* v. *Cruikshank*, 92 U.S. 542, 552-554 (1875), and that right cannot be denied to an entire class of citizens without compelling justification, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). State governments must "act as neutral entities, ready to take instruction and to enact laws when their citizens so demand." *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring). But government cannot take instruction from those whom it cannot see or hear. The Illinois Attorney General testified that he "had innumerable complaints regarding lack of ac-

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[21] See ID 506 (adult victims of abuse with developmental disabilities denied equal rights to testify in court); Consol. Gov't C.A. Br. at 3, *Lane* v. *Tennessee*, 315 F.3d 680 (6th Cir. 2003) (No. 98-6730) (Lane arrested for two misdemeanors and ordered to report for hearing at inaccessible courthouse; the first day he crawled up the stairs to the courtroom; the second day he was arrested for failure to appear when he refused to crawl or be carried up the stairs; hearing later held with defendant forced to remain outside while counsel shuttled between him and the courtroom). For additional examples of inaccessible courthouses and court proceedings, see AL 15; WV 1745; MA 812; CA 254; CO 273; ID 528; PA 1394; MS 998; WA 1690; MS 990; SD 1475; NC 1161-1164; AL 5; DE 345; GA 374; HI 455; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

cess to public services—people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building," and that "individuals who are deaf or hearing impaired call[] our office for assistance because the arm of government they need to reach is not accessible to them." *May 1989 Hearings* 488, 491. Another individual, "who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room." IN 626. Access to other important government buildings and officials depended upon the individual's willingness to crawl or be carried.[22]

(v) Law enforcement: Persons with disabilities have also been victimized in their dealings with law enforcement, in violation of their Fourteenth Amendment right to due process and protection from unreasonable searches and seizures. When police in Kentucky learned that a man they arrested had AIDS, "[i]nstead of putting the man in jail, the officers locked him inside his car to spend the night." 2 *Leg. Hist.* 1005 (Belinda Mason). Police refused to accept a rape complaint from a blind woman because she could not make a visual identification. NM 1081. A person in a wheelchair

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[22] See *Spectrum* 39 (76% of State-owned buildings offering services and programs for the general public are inaccessible and unusable for persons with disabilities); *May 1989 Hearings* 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); AK 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped and disabled."; City Manager responded that "he runs this town * * * and no one is going to tell him what to do."). For additional examples of inaccessible government officials and offices, see H.R. Rep. No. 485, *supra*, Pt. 2, at 40; *May 1989 Hearings* 76; IN 651; WIS 1758; NY 1119; *Cal. Report* 70; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

was given a ticket and six months' probation for obstructing traffic on the street, even though the person could not use the sidewalk because it lacked curb cuts. VA 1684. Task Force Chairman Justin Dart testified, moreover, that persons with hearing impairments "have been arrested and held in jail over night without ever knowing their rights nor what they are being held for." 2 *Leg. Hist.* 1331. A parole agent "sent a man who uses a wheelchair back to prison since he did not show up for his appointments even though * * * he could not make the appointments because he was unable to get accessible transportation." *Cal. Report* 103.[23]

(vi) Child custody: This Court has long recognized that the Constitution protects and respects the sanctity of the parent-child relationship. See, *e.g.*, *Troxel* v. *Granville*, 530 U.S. 57 (2000); *Stanley* v. *Illinois*, 405 U.S. 645 (1972). In addition, the Due Process Clause requires States to afford individuals with disabilities fair child custody proceedings, including the opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg* v. *Kelly*, 397 U.S. 254, 267 (1970) (citation and quotation marks omitted). But the Task Force Chairman testified that "clients whose chil-

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[23] See also 2 *Leg. Hist.* 1115 (Paul Zapun) (sheriff threatens persons with disabilities who stop in town due to car trouble); *id.* at 1197 (police officer taunted witness by putting a gun to her head and pulling the trigger on an empty barrel, "because he thought it would be 'funny' since I have quadraparesis and couldn't flee or fight"); *Task Force Report* 21 (six wheelchair users *arrested* for failing to leave restaurant after manager complained that "they took up too much space"); TX 1541 (police refused to take an assault complaint from a person with a disability); LA 748 (police called to Burger King because staff believed disabled customer was acting strangely, and made the customer leave town); AL 6, DE 345, KS 673, WV 1746, IL 572 (all: lack of interpreter for deaf arrestee). For additional examples of harassment and inappropriate treatment, see 2 *Leg. Hist.* 1196 (Cindy Miller); IL 569-570, 583; *Cal. Report* 101-104; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting). In addition, persons with disabilities, like epilepsy, are "frequently inappropriately arrested and jailed" and "deprived of medications while in jail." H.R. Rep. No. 485, *supra*, Pt. 3, at 50.

dren have been taken away from them a[re] told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?" 2 *Leg. Hist.* 1331 (Justin Dart). Another government agency refused to authorize a couple's adoption of a child solely because the woman had muscular dystrophy. MA 829.[24]

(vii) Institutionalization: The Constitution protects individuals with disabilities from unjustified institutionalization and from unduly severe treatment while institutionalized. *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 322 (1982). Yet unconstitutional denials of appropriate treatment and unreasonable institutionalization of persons in state mental hospitals were commonplace. See 2 *Leg. Hist.* 1203 (Lelia Batten) (state law ineffective; state hospitals are "notorious for using medication for controlling the behavior of clients and not for treatment alone. Seclusion rooms and restraints are used to punish clients."); *id.* at 1262-1263 (Eleanor C. Blake) (detailing the "minimal, custodial, neglectful, abusive" care received at state mental hospital, and willful indifference resulting in rape); *Spectrum* 34-35.[25]

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[24] See also H.R. Rep. No. 485, *supra*, Pt. 3, at 25 ("These discriminatory polices and practices affect people with disabilities in every aspect of their lives * * * [including] securing custody of their children."); *id.* Pt. 2, at 41 ("[B]eing paralyzed has meant far more than being unable to walk—it has meant being * * * deemed an 'unfit parent'" in custody proceedings.); 2 *Leg. Hist.* 1611 n.10 (Arlene Mayerson) ("Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent."); *Spectrum* 40; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples); *Shapiro*, *supra*, at 26 (woman with cerebral palsy denied custody of her two sons; children placed in foster care instead); *In re Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply because he is physically handicapped"); Appendix A, *infra*.

[25] See also Gov. Kitzhaber, *supra* (admitting the use of "inhumane devices to restrain and control patients" until "the mid 1980's"); *Cal. Report* 114; 132 Cong. Rec. 10589 (1986) (Sen. Kerry) (findings of

Indeed, in the years immediately preceding enactment of the Disabilities Act, the Department of Justice found unconstitutional treatment of individuals with disabilities in state institutions for the mentally retarded or mentally ill in more than half of the States. One facility forced mentally retarded residents to inhale ammonia fumes as a form of punishment. See Notice of Findings Regarding Los Lunas Hosp. & Training Sch. 2. Residents in other facilities lacked adequate food, clothing and sanitation. Many state facilities failed to provide basic safety to individuals with mental illness or mental retardation, resulting in serious physical injuries, sexual assaults, and deaths. See Appendix B, *infra*.

(viii) Zoning: Congress knew that *Cleburne*, where this Court found unconstitutional discrimination in a zoning decision based on irrational fears and stereotypes, was not an isolated incident. In Wyoming, a zoning board declined to authorize a group home because of "local residents' un-

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investigation of State-run mental health facilities "were appalling. The extent of neglect and abuse uncovered in their facilities was beyond belief."); *Civil Rights of Institutionalized Persons: Hearings on S. 1393 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 127 (1977) (Michael D. McGuire, M.D.) ("it became quite clear * * * that the personnel regarded patients as animals, * * * and that group kicking and beatings were part of the program"); *id.* at 191-192 (Dr. Philip Roos); *Civil Rights for Institutionalized Persons: Hearings on H.R. 2439 and H.R. 5791 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 239 (1977) (Stanley C. Van Ness) (describing "pattern and practice of physical assaults and mental abuse of patients, and of unhealthy, unsanitary, and anti-therapeutic living conditions" in New Jersey state institutions); *Civil Rights of Institutionalized Persons: Hearings on H.R. 10 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 34 (1979) (Paul Friedman) ("[A] number of the residents were literally kept in cages. A number of those residents * * * had lost the ability to walk, had become incontinent, and had regressed because of these shockingly inhumane conditions of confinement."); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

founded fears that the residents would be a danger to the children in a nearby school." WY 1781. In New Jersey, a group home for those who had suffered head injuries was barred because the public perceived such persons as "totally incompetent, sexual deviants, and that they needed 'room to roam.' * * * Officially, the application was turned down due to lack of parking spaces, even though it was early established that the residents would not have automobiles." NJ 1068.[26]

(ix) Licensing: Petitioner erroneously argues (Br. 18-24) that the legislative record is devoid of evidence of discriminatory treatment in licensing. The House Report discussed a woman who was denied a teaching credential, not because of her substantive teaching skills, but because of her paralysis. H.R. Rep. No. 485, *supra*, Pt. 2, at 29. See also 2 *Leg Hist.* 1611 n.9 (Arlene Mayerson) (teaching license denied "on the grounds that being confined to a wheelchair as a result of polio, she was physically and medically unsuited for teaching") (quoting *Heumann* v. *Board of Educ.*, 320 F. Supp. 623 (S.D.N.Y. 1970)); WY 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible).[27]

(x) Public transportation: Individuals reported discriminatory treatment on public transportation that lacked any rational basis and that "made no sense in light of how the [government] treated other groups similarly situated in

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[26] For additional examples, see 2 *Leg. Hist.* 1230 (Larry Urtan); AL 2, 31; CO 283; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) Appendix A, *infra*.

[27] See also CA 261 (discrimination in licensing teachers); HI 479 (discrimination in licensing); TX 1549 (state licensing requirements for teaching deaf students include the ability to hear); TX 1528 & 1542 (interpreters and readers not allowed for licensing exams); TX 1543 (blind applicant not allowed to take state chiropractor's exam because she could not read x-ray without assistance); *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting) (citing additional examples).

relevant respects." *Garrett*, 531 U.S. at 366 n.4. One student testified:

> Some of the drivers are very rude and get mad if I want to take the bus. Can you believe that? I work and part of my taxes pay for public buses and then they get mad just because I am using a wheelchair. * * * It is hard for people to feel good about themselves if they have to crawl up the stairs of a bus, or if the driver passes by without stopping.

2 *Leg. Hist.* 993 (Jade Calegory); MA 831 ("Blacks wanted to ride in the front of the bus. Disabled people just want[] on."). A high-level Connecticut transportation official responded to requests for accessibility by asking "Why can't all the handicapped people live in one place and work in one place? It would make it easier for us." *Id.* at 1085 (Edith Harris).[28]

(xi) Prison conditions: The Eighth Amendment protects inmates with disabilities against treatment that is deliberately indifferent to their serious medical needs and safety or imposes wanton suffering. *Farmer* v. *Brennan*, 511 U.S. 825 (1994); *Rhodes* v. *Chapman*, 452 U.S. 337, 347 (1981). But Congress heard that "their jailers rational[ize] taking away their wheelchairs as a form of punishment as if that is different than punishing prisoners by breaking their legs." 2 *Leg. Hist.* 1190 (Cindy Miller). Another prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead." *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986).[29]

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[28] For additional examples, see 2 *Leg. Hist.* 1097 (Bill Dorfer); *id.* at 1190 (Cindy Miller); WA 1716; *Garrett*, 531 U.S. at 391-424 (Breyer, J., dissenting).

[29] See also *Spectrum* 168 (discrimination in treatment and rehabilitation programs available to inmates with disabilities; inaccessible jail cells and toilet facilities); NM 1091 (prisoners with developmental disabilities subjected to longer terms of imprisonment); Appendices A & B, *infra*. The Attorney General's enforcement activities revealed that individuals

(xii) Other public services: The scope of the testimony offered to Congress regarding unconstitutional treatment swept so broadly, touching virtually every aspect of individuals' encounters with their government, as to defy isolating the problem into select categories of state action. Services and programs as varied as the operation of public libraries,[30] public swimming pools and park programs,[31] homeless shelters,[32] and benefit programs[33] exposed the discriminatory attitudes of officials.

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awaiting placement in State mental institutions in Mississippi were held in a county jail and routinely left for days shackled in a "drunk tank" without any mental health treatment or supervision. Notice of Findings Regarding Hinds County Detention Ctr. 3 (1986).

[30] See 2 *Leg. Hist.* 1100 (Shelley Teed-Wargo) (town library refused to let person with mental retardation check out a video "because he lives in a group home," unless he was accompanied by a staff person or had a written permission slip); PA 1391 (same rule for library cards for "those having physical as well as mental disabilities").

[31] A paraplegic Vietnam veteran was forbidden to use a public pool; the park commissioner explained that "[i]t's not my fault you went to Vietnam and got crippled." 3 *Leg. Hist.* 1872 (Peter Addesso); see also *id.* at 1995 (Rev. Scott Allen) (woman with AIDS and her children denied entry to a public swimming pool); WIS 1752 (deaf child denied swimming lessons); NC 1156 (mentally retarded child not allowed in pool because of "liability risk"); CA 166 (inaccessible public recreation site); MS 855 (same); *May 1989 Hearings* 76 (Ill. Att'y Gen. Hartigan) (visually impaired children with guide dogs "cannot participate in park district programs when the park has a 'no dogs' rule"); NC 1155 (blind people told not to participate in regular parks and recreation programs).

[32] CA 216 (wheelchair users not allowed in homeless shelter); CA 223 (same); DE 322 (same for mentally ill).

[33] See 2 *Leg. Hist.* 1078 (Ellen Telker) ("State and local municipalities do not make many materials available to a person who is unable to read print."); *id.* at 1116 (Virginia Domini) (persons with disabilities "must fight to function in a society where * * * State human resources [*sic*] yell 'I can't understand you,' to justify leaving a man without food or access to food over the weekend"); IA 664 (person with mild mental retardation denied access to literacy program); KS 713 (discrimination in state job training program); IL 533 (female disability workshop participants advised to get sterilized); AK 72 (no interpreter for deaf at state motor vehicles department). For examples of inaccessible social service

3. Other Evidence Confirms The Problem

In *Garrett*, Justice Kennedy suggested that, if a widespread problem of disability discrimination existed, "one would have expected to find * * * extensive litigation and discussion of the constitutional violations." 531 U.S. at 376 (Kennedy, J., concurring). Appendix A to this brief provides a non-exhaustive list of cases in which courts have found discrimination and the deprivation of fundamental rights on the basis of disability. Many of the cases specifically found constitutional violations. In others, the facts support that conclusion, but the existence of statutory relief allowed the court to avoid the constitutional question. Federal efforts to enforce the rights of individuals with disabilities offer still more evidence. See *South Carolina*, 383 U.S. at 312 (considering evidence collected in Department of Justice investigations). In public reports, the Department of Justice has either litigated or settled dozens of cases to ensure access to the courts and other government buildings, reasonable treatment by law enforcement officials, and protection against other forms of discrimination that implicate important constitutional rights.[34] In addition, the Department of

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agencies, see AK 145; OH 1218; AZ 116; AZ 127; HI 456; ID 541; see generally *Spectrum* App. A (identifying 20 broad categories of state-provided or supported services and programs in which discrimination against persons with disabilities arises).

[34] Many of these reports, *Enforcing the ADA: A Status Report from the Department of Justice*, are available at <http://www.usdoj.gov/crt/ada>. See, *e.g.*, Oct.-Dec. 2001 Report 9 (candidate for city council who uses a wheelchair unable to access a city council platform to address constituents); Apr.-June 1998 Report 8-10 (absence of communication assistance results in longer pre-trial detention for detainees with disabilities and denial of medical treatment and communication with family members); July-Sept. 1997 Report 7-9 (State general assembly inaccessible for lobbyists with mobility impairments; lack of effective participation in court proceedings); Apr.-June 1997 Report 5-7 (blind voters; inaccessible courts; unreasonable treatment during traffic stop of deaf motorist); Oct.-Dec. 1994 Report 4-6 (access to town hall; effective participation in court proceedings; inaccessible polling places); *Enforcing the ADA:*

Justice has found unconstitutional treatment of individuals with disabilities in institutions or prisons in more than 30 States. See Appendix B, *infra*.

4. *Special Significance Of Discrimination In Government Services*

The foregoing record of extensive state and local discrimination in the provision of government services provides a solid predicate for exercise of Congress's Section 5 enforcement power, for three reasons. *First*, in *Garrett*, this Court held that evidence of "hardheaded[]—and perhaps hardhearted[]"—employment discrimination based on disability did not violate the Constitution if it could be justified by "any reasonably conceivable state of facts that could provide a rational basis for the classification." 531 U.S. at 367-368. The constitutional balance under Title II, however, is quite different. Much of the identified state conduct interferes with or threatens the fundamental rights of individuals with disabilities, or occurs where the right to equal protection intersects with other constitutional rights, see *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 881 (1990). Such violations are subject to more intense scrutiny and cannot be justified by any conceivable rationale. A particular class of individuals cannot be excluded from voting, participating in court proceedings, accessing public meetings and services, or raising their children based on nothing more than administrative convenience. Rather, such infringements are unconstitutional "unless shown to be necessary to promote a *compelling* governmental interest." *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969); see also *Troxel*, 530 U.S. at 65 (plurality opinion); *Clark* v. *Jeter*, 486 U.S. 456, 461 (1988).

Looking Back on a Decade of Progress 4-8 (July 2000) (access to public meetings and public offices, to courts and court proceedings; fair treatment by law enforcement).

Second, much of the identified conduct fails rational basis scrutiny. Even that low constitutional threshold cannot justify beating a deaf student for failure to follow spoken instructions, refusing to let individuals with disabilities on buses, excluding a paralyzed veteran from a public swimming pool, or denying a disabled student a college education either because "it would be 'disgusting' to [her] roommates to have to live with a woman with a disability," or because of groundless stereotypes that blind people cannot teach, provide competent rehabilitation counseling, or succeed in a music course. This Court reaffirmed in *Garrett* that "mere negative attitudes, or fear," alone cannot justify disparate treatment of those with disabilities. 531 U.S. at 367.

Moreover, a purported rational basis for treatment of the disabled will fail if the State does not accord the same treatment to other groups similarly situated, *Garrett*, 531 U.S. at 366 n.4; *Cleburne*, 473 U.S. at 447-450, or if it is based on "animosity" towards the disabled, *Romer* v. *Evans*, 517 U.S. 620, 634 (1996). It accordingly is not enough that the State can offer a rational basis—such as finances—for failing to offer benefit information or services in handicap-accessible formats if the State is already accommodating the special communication needs of other constituents by offering such information in, for example, Spanish. Police may not refuse to take complaints from blind individuals, while taking them from victims who were blindfolded or unconscious. Moreover, many of the instances of discriminatory treatment reported to Congress arose in contexts, like education and zoning, where state actors already make accommodations for other groups, but are selectively resistant to doing so for those with disabilities.

Third, based on the record before it, Congress could reasonably conclude that the aggregate effect of consistently excluding individuals with disabilities from a broad range of important government services caused a constitutional problem that is greater than the sum of its parts. The consistent

distribution of benefits and services in a way that maintains a permanent subclass of citizens is inimical to the core purposes of the Equal Protection Clause. See *Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 623 (1985); *Plyler* v. *Doe*, 457 U.S. 202, 213 (1982). States cannot balance their budgets or allocate their resources in a manner that "divide[s] citizens into * * * permanent classes" and apportions "rights, benefits and services according to" their class. *Zobel* v. *Williams*, 457 U.S. 55, 64 (1982).

5. State Laws Provided Insufficient Protection

Petitioner argues (Br. 24-26) that the existence of state laws prohibiting some forms of disability discrimination made congressional action unnecessary. But that argument confuses existence with effectiveness. Evidence before Congress demonstrated that state laws were "inadequate to address the pervasive problems of discrimination that people with disabilities are facing." S. Rep. No. 116, *supra*, at 18; see also *ibid.* (section of report entitled "CURRENT FEDERAL AND STATE LAWS ARE INADEQUATE"); H.R. Rep. No. 485, *supra*, Pt. 2, at 47 (same).[35]

State officials themselves broadly agreed with that assessment. The 50 State Governors' Committees "report[ed] that existing State laws do not adequately counter * * * discrimination." S. Rep. No. 116, *supra*, at 18; H.R. Rep. No. 485, *supra*, Pt. 2, at 47. California itself noted that "gaps" and "contradictions" in state law justified enactment of the Disabilities Act. *Cal. Report* 22-23. The Illinois Attorney General testified that "[p]eople with disabilities should not have to win these rights on a State-by-State basis," and that

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[35] See also 136 Cong. Rec. 11455 (1990) (Rep. Wolpe), *id.* at 11461 (Rep. Levine); 134 Cong. Rec. 9384-9385 (1988) (Sen. Simon); 2 *Leg. Hist.* 963 (Sandra Parrino); *id.* at 967 (Adm. James Watkins) ("Too many States, for whatever reason, still perpetuate confusion. It is time for Federal action."); *id.* at 1642-1643 (Arlene Mayerson) (noting variations and gaps in coverage of state statutes); 3 *Leg. Hist.* 2245 (James Ellis); AL 24 (failure to enforce laws protecting persons with disabilities); AK 52 (same).

"[i]t is long past time * * * [for] a national policy that puts persons with disabilities on equal footing with other Americans." *May 1989 Hearings* 77.[36]

In addition, petitioner exaggerates the coverage of state laws. See generally J. Flaccus, *Handicap Discrimination Legislation: With Such Inadequate Coverage at the Federal Level, Can State Legislation Be of Any Help?*, 40 Ark. L. Rev. 261 (1986) (detailing gaps in coverage of state laws). Prior to 1990, nearly half of the States did not protect persons with mental illness and/or mental disabilities. See *id.* at 278-280. New Hampshire excluded disabilities caused by illness, N.H. Rev. Stat. Ann. § 354-A:3(XIII) (1984), while Arizona excluded disabilities which were first manifested after the age of 18, Ariz. Rev. Stat. § 36-551(11)(b) (1986). Flaccus, *supra*, at 285. Few States protected against discrimination based on either a perceived disability or a history of illness such as cancer. See B. Hoffman, *Employment Discrimination Based on Cancer History*, 59 Temp. L.Q. 1 (1986). Many States failed to provide for private rights of action and compensatory damages, effectively leaving victims of discrimination without enforceable remedies. *Id.* at App. B; Flaccus, *supra*, at 300-310, 317-321.[37]

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[36] Other state and local officials echoed those sentiments. See Department of Health & Human Servs., *Visions of: Independence, Productivity, Integration for People with Developmental Disabilities* 29 (1990) (19 States strongly recommended passage of the Disabilities Act); 2 *Leg. Hist.* 1050 (Elmer Bartels, Mass. Rehab. Comm'n); *id.* at 1455-1456 (Nikki Van Hightower, Treas., Harris Co., Tex.); *id.* at 1473-1474 (Robert Lanier, Chair, Metro. Transit Auth. of Harris Co., Tex.); *id.* at 1506 (Texas State Sen. Chet Brooks) ("We cannot effectively piece these protections together state by state."); *id.* at 1508; *May 1989 Hearings* 778 (Ohio Governor). Indeed, state officials themselves had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates: Federal and State Compliance with Employment Protections and Architectural Barrier Removal* 87 (Apr. 1989).

[37] See also *May 1989 Hearings* 386-394 (lengthy analysis of state laws); 3 *Leg. Hist.* 2245 (James Ellis) ("state laws have not provided substantial

Furthermore, petitioner's assertions concerning the effectiveness of those laws cannot supplant Congress's findings based on the first-hand testimony of witness after witness about the instances of discrimination they faced and the ineffectiveness of state laws. Although there may be specific contexts, such as Section 5 legislation designed to remedy violations of the Takings Clause or the privilege against self-incrimination, in which the lack of a state remedy may be relevant to the existence of a constitutional violation, cf. *Florida Prepaid*, 527 U.S. at 642-643, the *possibility* of a state remedy for discrimination does not make the underlying conduct constitutional. Just as state laws against race discrimination have neither eradicated the problem nor undermined the basis for subjecting state employers to federal prohibitions,[38] Congress was equally justified in concluding that state laws against disability discrimination had generally been ineffective in combating the lingering effects of prior official discrimination and exclusionary laws and policies and, more importantly, in changing the behavior of individual state actors.

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protection to people with disabilities"); *Employment Discrimination Against Cancer Victims and the Handicapped: Hearing Before the Subcomm. on Employment Opportunity of the House Comm. on Educ. & Labor*, 99th Cong., 1st Sess. 62 (1985) (Rep. Moakley) ("[O]ne-fourth of the states have no protection for the handicapped. Additionally, even those states with laws differ greatly in their regulations.") (attaching ten-state survey showing gaps in coverage of laws).

[38] See, *e.g.*, S. Rep. No. 415, 92d Cong., 1st Sess. 19 (1971) (37 States had equal employment laws at the time Title VII was extended to the States).

C. The Disabilities Act Is Reasonably Tailored To Remedy And Prevent Unconstitutional Discrimination Against Persons With Disabilities

While Congress "must tailor its legislative scheme to remedying or preventing" the unconstitutional conduct it has identified, *Florida Prepaid*, 527 U.S. at 639, "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern, and Congress must have wide latitude in determining where it lies," *Flores*, 521 U.S. at 519-520. Thus, the relevant inquiry is not whether Title II "prohibit[s] a somewhat broader swath of conduct," *Garrett*, 531 U.S. at 365, than would the courts. "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence." *Ibid.* Rather, the question is whether, in light of the scope of the problem identified by Congress, the enactment "is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" *Kimel*, 528 U.S. at 86 (quoting *Flores*, 521 U.S. at 532). Title II is not.

1. Title II's Terms Are Tailored To The Constitutional Problems It Remedies

Because Title II targets only discrimination that threatens fundamental rights or that is unreasonable, much of Title II's operation targets conduct outlawed by the Constitution itself. As applied to discrimination in voting, child custody proceedings, criminal cases, institutionalization, conditions of confinement, interactions with law enforcement, judicial proceedings, access to public officials and offices, and other areas implicating fundamental rights, Title II tracks the Fourteenth Amendment when it prevents the disparate deprivation of those rights for invidious or insubstantial reasons.

Furthermore, Title II targets discrimination that is unreasonable and, in so doing, ensures (as this Court did in *Cleburne*, 473 U.S. at 447-450), that the government's articulated rationale for differential treatment does not mask impermissible animus and does not result in the differential treatment of similarly situated groups. The States retain their discretion to exclude persons from programs, services, or benefits for any lawful reason unconnected with their disability or for no reason at all. The Disabilities Act does not require preferences and permits the denial of benefits or services if a person cannot "meet[] the essential eligibility requirements" of the governmental program or service, 42 U.S.C. 12131(2). But once an individual proves that he can meet all the essential eligibility requirements of a program or service, especially those programs and services that implicate fundamental rights, the government's interest in excluding that individual solely "by reason of such disability," 42 U.S.C. 12132, is both minimal and, in light of history, constitutionally circumscribed. At the same time, permitting the States to retain and enforce their essential eligibility requirements protects their legitimate interests in selecting and structuring governmental activities. The Disabilities Act thus balances a State's legitimate operational interests against the right of a person with a disability to be judged "by his or her own merit and essential qualities." *Rice* v. *Cayetano*, 528 U.S. 495, 517 (2000).

As petitioner notes (Br. 29-30), the Disabilities Act requires "reasonable modifications" in public services, 42 U.S.C. 12131(2). That requirement, however is precisely tailored to the unique features of disability discrimination in two ways. *First*, given the history of segregation and isolation and the resulting entrenched stereotypes, fear, prejudices, and ignorance about persons with disabilities, Congress reasonably determined that a simple ban on overt discrimination would be insufficient. Therefore, the Disabilities Act both prevents difficult-to-prove discrimination and af-

firmatively promotes the integration of individuals with disabilities in order to remedy past unconstitutional conduct and to prevent future discrimination.

Congress further concluded that the demonstrated refusal of state and local governments to undertake reasonable efforts to accommodate and integrate persons with disabilities within their programs, services, and operations would freeze in place the effects of those governments' prior official exclusion and isolation of individuals with disabilities, creating a self-perpetuating spiral of segregation, stigma, ill treatment, neglect, and degradation. See *Gaston County*, 395 U.S. at 296-297 (constitutionally administered literacy test banned because it perpetuates the effects of past discrimination). Congress also concluded that, by reducing stereotypes and misconceptions, integration reduces the likelihood that constitutional violations will recur. Cf. *Olmstead*, 527 U.S. at 600 (segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). Moreover, given the record of discrimination and unconstitutional treatment of the disabled, Congress reasonably concluded that the failure to make reasonable accommodations to the rigid enforcement of seemingly neutral criteria can often mask invidious, but difficult to prove, discrimination. Congress' Section 5 power includes the ability to ensure that constitutional violations are not left unremedied because of difficulties of proof. See, *e.g.*, *South Carolina*, 383 U.S. at 314-315.

Second, the Constitution itself already requires individualized consideration and modification of practices or programs when necessary to avoid infringing on fundamental rights.[39] Beyond that, States may not justify infringements

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[39] See, *e.g.*, *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 121-122 (1996) (transcript fee modified in appeal of parental termination, where it was "not likely to impose an undue burden on the State"); *Stanley*, 405 U.S. at 651-658 (State must provide individualized determination of father's fitness to raise his children.).

on fundamental rights by pointing to the administrative convenience or cost savings achieved by maintaining barriers to the enjoyment of those rights.[40]

The statute, moreover, requires modifications only where "reasonable," 42 U.S.C. 12131(2). Governments need not make modifications that "impose an undue hardship" or require "fundamental alterations in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the program. 42 U.S.C. 12111(10), 12112(b)(5)(A); 28 C.F.R. 35.130(b)(7), 35.150(a)(3), 35.164; *Olmstead*, 527 U.S. at 606 n.16 (plurality opinion). Furthermore, based on the consistent testimony of witnesses and expert studies, Congress determined that the vast majority of modifications entail little or no cost. One local government official stressed that "[t]his bill will not impose great hardships on our county governments" because "the majority of accommodations for employees with disabilities are less than $50" and "[t]he cost of making new or renovated structures accessible is less than 1 percent of the total cost of construction." 2 *Leg. Hist.* 1443 (Nikki Van Hightower, Treasurer, Harris Cty., Tex.).[41]

Title II, then, goes further than the Constitution itself only to the extent that some disability discrimination may have no impact on fundamental rights and may be rational for constitutional purposes, but still be unreasonable under

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[40] See, *e.g.*, *Little* v. *Streater*, 452 U.S. 1, 13-17 (1981) (State must pay for blood test for indigent defendant in paternity suit.); *Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 263 (1974); *Carrington* v. *Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State.").

[41] See also S. Rep. No. 116, *supra*, at 10-12, 89, 92; H.R. Rep. No. 485, *supra*, Pt. 2, at 34; 2 *Leg. Hist.* 1552 (EEOC Comm'r Evan Kemp); *id.* at 1077 (John Nelson); *id.* at 1388-1389 (Justin Dart); *id.* at 1456-1457; *id.* at 1560 (Jay Rochlin); 3 *Leg. Hist.* 2190-2191 (Robert Burgdorf); *Task Force Report* 27; *Spectrum* 2, 30, 70; GAO, *Briefing Report on Costs of Accommodations, Americans with Disabilities Act: Hearing Before the House Comm. on Small Business*, 101st Cong., 2d Sess. 190 (1990).

the standards of the Disabilities Act. That margin of statutory protection does not exceed Congress' authority for two reasons. *First*, like Title VII on which it was modeled, that statutory protection is necessary to enforce this Court's constitutional standard by reaching unconstitutional conduct that would otherwise escape detection in court and to deter future constitutional violations.

Second, "[a] proper remedy for an unconstitutional exclusion * * * aims to eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future." *United States* v. *Virginia*, 518 U.S. 515, 547 (1996). Section 5 thus empowers Congress to do more than simply prohibit the creation of new barriers to equality; it can require States to tear down the walls they erected during decades of discrimination and exclusion. See *id.* at 550 n.19 (Equal Protection Clause itself can require modification of facilities and program to ensure equal access). Title II's accommodation requirements eliminate the effects of past discrimination by ensuring that persons previously invisible to program and building designers are now considered part of the government's service constituency. "Just as it is unthinkable to design a building with a bathroom only for use by men, it ought to be just as unacceptable to design a building that can only be used by able-bodied persons. It is exclusive *designs*, and not any inevitable consequence of a disability that results in the isolation and segregation of persons with disabilities in our society." 3 *Leg. Hist.* 1987 n.4 (Laura Cooper).[42] In short, Title II is appropriate legislation because the remedy for segregation is integration, not inertia.

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[42] Likewise, child-size and adult-size water fountains routinely appear in buildings; requiring accessible fountains just expands that routine design process. 2 *Leg. Hist.* 993-994 (Jade Calegory) ("Black people had to use separate drinking fountains and those of us using wheelchairs cannot even reach some drinking fountains. We get thirsty, too.").

2. Title II Is As Broad As Necessary

Petitioner objects (Br. 28) to the Disabilities Act's broad coverage and lack of either time or geographical limitations. That objection fails for two reasons. *First*, such geographical restrictions and sunset provisions exist in only a few provisions of the Voting Rights Act—such as the preclearance provisions and the requirements pertaining to election observers and examiners. The balance of the Voting Rights Act and every other piece of Section 5 legislation, including Title VII and the Equal Pay Act, apply nationwide and have no termination dates. See also *Flores*, 521 U.S. at 533 ("This is not to say, of course, that § 5 legislation requires termination dates [or] geographic restrictions."). Further, because disability discrimination admits of no particular geographic boundaries and the process of dismantling the vestiges of centuries of constitutional deprivations has only recently commenced, Congress reasonably chose not to enact such limitations in Title II.

Second, to the extent petitioner would insist on geographic or time limitations on Title II's substantive provisions, its argument cannot be reconciled with its current concession (Pet. Br. 26 n.8) that those same provisions can be enforced against the States regardless of whether Title II's abrogation is appropriate Section 5 legislation. Geographical restrictions and sunset provisions have never been constitutional prerequisites for the exercise of any other legislative power (such as the Commerce Clause, or the Necessary and Proper Clause), and there is no basis for drawing a different constitutional baseline for Section 5 legislation.

The operative question, moreover, is not whether Title II is broad, but whether it is broader than necessary. It is not. Congress found that the history of unconstitutional treatment and the risk of future discrimination found by Congress pertain to all aspects of governmental operations. It determined that only a comprehensive effort to integrate persons

with disabilities would end the cycle of isolation, segregation, and second-class citizenship, and deter further discrimination. Integration in education alone, for example, would not suffice if there were not going to be jobs and professional licenses for those who received the education. Integration in employment and licensing would not suffice if persons with disabilities lacked transportation. Integration in transportation would be insufficient if persons with disabilities could not get into the facilities to which they traveled. Ending unnecessary institutionalization would be of little gain if neither government services nor the social activities of public life (libraries, museums, parks, and recreational services) were accessible to bring persons with disabilities into the life of the community. And none of those efforts would suffice if persons with disabilities continued to lack equivalent access to government officials, courthouses, and polling places. In short, Congress chose a comprehensive remedy because it confronted an all-encompassing, inter-connected problem. To do less would be as ineffectual as "throwing an 11-foot rope to a drowning man 20 feet offshore and then proclaiming you are going more than halfway," S. Rep. No. 116, *supra*, at 13.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX A

Cases Evidencing Unconstitutional Treatment of Individuals with Disabilities:

Foucha v. *Louisiana*, 504 U.S. 176-180 (1992) (Louisiana statute, which allowed continued confinement of the mentally ill who were acquitted of crimes by reason of insanity, resulted in unconstitutional confinement in violation of the Due Process Clause, where the hospital review committee had reported no evidence of continuing mental illness and recommended conditional discharge); *City of Cleburne* v. *Cleburne Living Ctr.*, 473 U.S. 432, 447-450 (1985) (unconstitutional zoning discrimination); *Youngberg* v. *Romeo*, 457 U.S. 307, 315, 321-324 (1982) (institutionalized persons have due process "right to adequate food, shelter, clothing, and medical care," "safe conditions," and freedom from unreasonable physical restraint, as well as to "such training as may be reasonable in light of [the resident's] liberty interests in safety and freedom from unreasonable restraints"); *O'Connor* v. *Donaldson*, 422 U.S. 563, 564 (1975) (unconstitutional confinement); *Delano-Pyle* v. *Victoria County*, 302 F.3d 567, 575-576 (5th Cir. 2002) (affirming a jury verdict that included evidence of a police officer giving a sobriety test and *Miranda* warnings to a deaf plaintiff who could not understand him, and then arresting the plaintiff); *Kiman* v. *New Hampshire Dep't of Corrs.*, 301 F.3d 13, 15-16 (disabled inmate stated Eighth Amendment claim for denial of accommodations needed to protect his health and safety due to his degenerative nerve disease), reh'g en banc granted, 310 F.3d 785 (1st Cir. 2002); *Popovich* v. *Cuyahoga County Ct. of Common Pleas*, 276 F.3d 808, 816 (6th Cir.)

(en banc) (deaf parent denied communication assistance in child custody proceeding), cert. denied, 123 S. Ct. 72 (2002); *Armstrong* v. *Davis*, 275 F.3d 849, 861-863 (9th Cir. 2001) (failure to conduct parole and parole revocation proceedings in a manner that disabled inmates can understand and in which they can participate), cert. denied, 123 S. Ct 72 (2002); *Baird* v. *Rose*, 192 F.3d 462, 464-466 (4th Cir. 1999) (seventh-grader suffering from clinical depression prohibited from singing in school choir); *Key* v. *Grayson*, 179 F.3d 996, 998 (6th Cir. 1999) (deaf inmate denied access to sex offender program required as precondition for parole), cert. denied, 528 U.S. 1120 (2000); *Bradley* v. *Puckett*, 157 F.3d 1022, 1025-1026 (5th Cir. 1998) (failure for several months to provide means for amputee to bathe lead to infection); *Innovative Health Sys., Inc.* v. *City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) (building permit denied for drug and alcohol treatment center "based on stereotypes and unsupported fears"); *Koehl* v. *Dalsheim*, 85 F.3d 86, 87-88 (2d Cir. 1996) (Eighth Amendment violated when inmate with serious vision problem denied glasses and treatment); *Weeks* v. *Chaboudy*, 984 F.2d 185, 187 (6th Cir. 1993) ("squalor in which [prisoner] was forced to live as a result of being denied a wheelchair" violated the Eighth Amendment); *Thomas S.* v. *Flaherty*, 902 F.2d 250, 253-254 (4th Cir.) (unconstitutional confinement when appropriate community placement available), cert. denied, 498 U.S. 951 (1990); *Chalk* v. *United States Dist. Ct. Cent. Dist. of Cal.*, 840 F.2d 701, 703 (9th Cir. 1988) (certified teacher barred from teaching after diagnosis of AIDS); *LaFaut* v. *Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (Powell, J.) (failure to provide paraplegic inmate with an

accessible toilet is cruel and unusual punishment); *Parrish* v. *Johnson*, 800 F.2d 600, 603, 605 (6th Cir. 1986) (prison guard repeatedly assaulted paraplegic inmates with a knife, forced them to sit in their own feces, and taunted them with remarks like "crippled bastard" and "[you] should be dead"); *Clark* v. *Cohen*, 794 F.2d 79, 85-87 (3d Cir.) (unconstitutional confinement), cert. denied, 479 U.S. 962 (1986); *Miranda* v. *Munoz*, 770 F.2d 255, 259 (1st Cir. 1985) (failure to provide medications for epilepsy, which caused prisoner's death, violated Eighth Amendment); *Lynch* v. *Baxley*, 744 F.2d 1452, 1459-1460 (11th Cir. 1984) (State subjected individuals awaiting civil commitment proceedings to unconstitutional conditions of confinement in county jails); *Pushkin* v. *Regents of Univ. of Colo.*, 658 F.2d 1372, 1382-83, 1387-1391 (10th Cir. 1981) (doctor with multiple sclerosis unconstitutionally denied residency out of concern about patients' reactions); *Ferrell* v. *Estelle*, 568 F.2d 1128, 1133 (5th Cir.) (deaf habeas petitioner's "rights were reduced below the constitutional minimum" because he could not understand his trial), withdrawn due to death of petitioner, 573 F.2d 867 (1978); *Gurmankin* v. *Costanzo*, 556 F.2d 184, 185-187 (3d Cir. 1977) (holding unconstitutional an irrebuttable presumption that blind teacher cannot instruct sighted students); *Wyatt* v. *Aderholt*, 503 F.2d 1305, 1310-1312 (5th Cir. 1974) (unconstitutional conditions of confinement for the mentally ill); *McCray* v. *City of Dothan*, 169 F. Supp. 2d 1260, 1279-1280 (M.D. Ala. 2001) (police officer had "not articulated any specific facts upon which suspicion reasonably could be founded" other than "the communication gap between a deaf man and herself"); *M.H.* v. *Bristol Bd. of*

Educ., 169 F. Supp. 2d 21, 24-25 (D. Conn. 2001) (possible substantive due process violation where school employees spat water in disabled student's face and restrained him so forcibly as to result in bruising); *Doe* v. *Rowe*, 156 F. Supp. 2d 35, 38-39, 52 (D. Me. 2001) (unconstitutional restriction on voting by those with mental disabilities); *Project Life, Inc.* v. *Glendening*, 139 F. Supp. 2d 703, 705 (D. Md. 2001) (unlawful rejection of permit for drug treatment facility based on "community prejudices"), aff'd, No. 01-1754, 2002 WL 2012545 (4th Cir. 2002); *Pathways Psychosocial* v. *Town of Leonardtown*, 133 F. Supp. 2d 772, 791-792 (D. Md. 2001) (denying summary judgment on claim that town officials violated Equal Protection Clause under *City of Cleburne* by zoning decisions that excluded a home for individuals with mental retardation) & *Pathways Psychosocial* v. *Town of Leonardtown*, 223 F. Supp. 2d 699, 704-705 (D. Md. 2002) (noting jury verdict against town and denying motion for new trial); *Salcido ex rel. Gilliland* v. *Woodbury County*, 119 F. Supp. 2d 900, 931 (N.D. Iowa 2000) (granting summary judgment for mentally ill plaintiff on claim that he was denied due process by State's denial of an appropriate institutional placement without notice or hearing); *New York* v. *County of Schoharie*, 82 F. Supp. 2d 19, 21-22 (N.D.N.Y. 2000) (inaccessible polling places); *Schmidt* v. *Odell*, 64 F. Supp. 2d 1014, 1016-1022 (D. Kan. 1999) (amputee forced to crawl around jail, resulting in injury and infection, in violation of Eighth Amendment); *Matthews* v. *Jefferson*, 29 F. Supp. 2d 525, 528-529 (W.D. Ark. 1998) (paraplegic litigant had to be carried up stairs to court room for all-day hearing at which he could not leave to get food or use the restroom to

empty catheter, resulting in infection; eventually had to crawl down steps to get out after everyone else left the courthouse without him); *Lewis* v. *Truitt*, 960 F. Supp. 175-178 (S.D. Ind. 1997) (Fourth Amendment prohibits use of force against an individual, whom officers know to be deaf, for not complying with officers' spoken commands); *Carty* v. *Farrelly*, 957 F. Supp. 727, 739 (D.V.I. 1997) ("The abominable treatment of the mentally ill inmates shows overwhelmingly that defendants subject inmates to dehumanizing conditions punishable under the Eighth Amendment."); *Kaufman* v. *Carter*, 952 F. Supp. 520, 523-524 (W.D. Mich. 1996) (amputee hospitalized after fall in inaccessible jail shower); *Harrelson* v. *Elmore County*, 859 F. Supp. 1465, 1466 (M.D. Ala. 1994) (paraplegic prisoner denied use of a wheelchair and forced to crawl around his cell); *T.E.P.* v. *Leavitt*, 840 F. Supp. 110, 111 (D. Utah 1993) (statute prohibiting and voiding marriages between individuals with AIDS); *Galloway* v. *Superior Court*, 816 F. Supp. 12, 14-15 (D.D.C. 1993) (blind individuals categorically excluded from jury service); *Nolley* v. *County of Erie*, 776 F. Supp. 715, 717-725 (W.D.N.Y. 1991) (Constitution violated where inmate with HIV was housed in the part of a prison reserved for inmates who are mentally disturbed, suicidal, or a danger to themselves, and was denied access to prison library and religious services); *Bonner* v. *Arizona Dep't of Corrs.*, 714 F. Supp. 420, 420-421 (D. Az. 1989) (deaf, mute, and vision-impaired inmate denied communication assistance, including in disciplinary proceedings, counseling sessions, and medical treatment); *DeLong* v. *Brumbaugh*, 703 F. Supp. 399, 405 (W.D. Pa. 1989) (decision to exclude

deaf individual from jury was "unreasonable, discriminatory and violative of Section 504 of the Rehabilitation Act"); *Doe* v. *Dolton Elem. Sch. Dist.*, 694 F. Supp. 440, 442 (N.D. Ill. 1988) (elementary student with AIDS excluded from attending regular classes or extracurricular activities); *Robertson* v. *Granite City Comm. Unit Sch. Dist.*, 684 F. Supp. 1002, 1004 (S.D. Ill. 1988) (seven-year old student with AIDS confined to a modular classroom where he was the only student); *Thomas* v. *Atascadero Unified Sch. Dist.*, 662 F. Supp. 376, 380-381 (C.D. Cal. 1986) (kindergarten student with AIDS excluded from class and forced to take home tutoring); *Garrity* v. *Gallen*, 522 F. Supp. 171, 214 (D.N.H. 1981) ("blanket discrimination against the handicapped * * * is unfortunately firmly rooted in the history of our country"); *New York State Ass'n for Retarded Children, Inc.* v. *Carey*, 466 F. Supp. 487, 490-493 (E.D.N.Y. 1979) (mentally retarded students excluded from public school system); *Hairston* v. *Drosnick*, 423 F. Supp. 180, 182-184 (S.D. W. Va. 1976) (school refused to admit child with spina bifida without the daily presence of her mother, even though student was of normal mental competence and capable of performing easily in a classroom situation); *Smith* v. *Fletcher*, 393 F. Supp. 1366, 1368 (S.D. Tex. 1975) (government assigned paraplegic, who had a Master's degree in physiology, to menial clerical tasks based on "arbitrary and unfounded decision as to her physical capabilities"), aff'd as modified, 559 F.2d 1014 (5th Cir. 1977); *Mills* v. *Board of Educ.*, 348 F. Supp. 866, 868-870 (D.D.C. 1972) (mentally retarded students excluded from public school system); *Pennsylvania Ass'n for Retarded Children* v. *Common-*

wealth, 334 F. Supp. 1257, 1257-1259 (E.D. Pa. 1971) (mentally retarded students excluded from public school system); *State* v. *Barber*, 617 So. 2d 974, 976 (La. Ct. App. 1993) ("[T]he Constitution requires that a defendant sufficiently understand the proceedings against him to be able to assist in his own defense. Clearly, a defendant who has a severe hearing impairment, without an interpreter, cannot understand the testimony of witnesses against him so as to be able to assist in his own defense."); *State* v. *Schaim*, 600 N.E.2d 661, 671- 672 (Ohio 1992) (under the Confrontation Clause "a severely hearing-impaired defendant cannot be tried without adopting reasonable measures to accommodate his or her disability"); *Peeler* v. *State*, 750 S.W.2d 687, 690-691 (Mo. Ct. App. 1988) (constitutionally ineffective assistance of counsel in failure to request an interpreter, where the hearing-impaired defendant was "probably unable to understand what was being said at trial"); *District 27 Comm. Sch. Bd.* v. *Board of Educ.*, 502 N.Y.S.2d 325, 327-329 (N.Y. Sup. Ct. 1986) (two school boards sought to prevent attendance of any student with AIDS in any school in the city, unless all of the students at that school had AIDS); *People* v. *Rivera*, 480 N.Y.S.2d 426, 434 (N.Y. Sup. Ct. 1984) (a conviction was unconstitutionally obtained because the deaf defendant had no interpreter and did not understand his trial); *State* v. *Staples*, 437 A.2d 266, 268 (N.H. 1981) (ineffective assistance of counsel in failing to secure assistance for hearing-impaired defendant whose disability made him "unable to assist effectively in the preparation of his defense"); *In re Carney*, 598 P.2d 36, 42 (Cal. 1979) (lower court "stereotype[d] William as a person deemed forever unable to be a good parent simply

because he is physically handicapped"); *Connecticut Inst. for the Blind* v. *Connecticut Comm'n on Human Rights & Opps.*, 405 A.2d 618, 621 (Conn. 1978) (blanket exclusion from state jobs of persons with visual impairments), modified, 355 N.Y.S.2d 185 (App. Div. 1974); *Bevan* v. *New York State Teachers' Retirement Sys.*, 345 N.Y.S.2d 921, 922-924 (Sup. Ct. 1973) (statute allowing forced retirement of teacher who became blind); *In re Adoption of Richardson*, 251 Cal. App.2d 222, 239 (Cal. 1967) (trial court "stated, in effect, that he will systematically strike any and all deaf-mute petitioners from any list of prospective adopting parents"); *State* v. *Board of Educ.*, 172 N.W. 153, 154 (Wis. 1919) (excluding a boy with cerebral palsy from public school because he "produces a depressing and nauseating effect upon the teachers and school children").

APPENDIX B

Findings of Investigations Under the Civil Rights Of Institutionalized Persons Act 42 U.S.C. 1997 et seq.

Between 1980 and the enactment of Title II of the Americans with Disabilities Act in 1990, Department of Justice investigations under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. 1997 et seq., found unconstitutional treatment of individuals with disabilities in institutions in more than twenty-five States. From 1980 until the present, unconstitutional conditions have been found in more than 200 institutions in more than thirty States throughout the country. The tables below describe some of the findings issued by the Department of Justice pursuant to 42 U.S.C. 1997b(a)(1). Copies of the complete findings letters will be provided to the Court upon request, and have been served upon counsel for petitioner and counsel for respondent Hason.

I. Investigations Prior to Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Rosewood Center	MD	1982	Failure to provide reasonable supervision and safety	Many residents sustained injuries during "low staffing periods" (p. 4). One resident left the facility unobserved and died of exposure.

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				A profoundly retarded resident drowned when staff left him unattended in a bathtub. Another died after being pushed down a flight of stairs (pp. 4-5). On another occasion, "six severely handicapped female residents * * * were allegedly raped by an outside intruder. There was only one staff person on duty to supervise the 32 residents * * * and only one security officer on duty to cover the entire Rosewood facility. While the inability of the residents to communicate apparently prevented state officials from confirming the rapes * * * several of the residents had positive tests for gonorrhea of the throat right after the incident" (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Several male patients "show[ed] the presence of venereal disease" and "nonconsensual sexual contact occurred between one resident and at least one and possibly three residents" (p. 4).
			Abuse of residents	An employee sexually abused a resident (p. 4).
			Unsanitary conditions	Facilities are deteriorating; the "stench of urine is prevalent in a number of buildings." Plumbing problems left overflowing toilets unrepaired for days; heating problems subjected patients to "sub-freezing temperature in the buildings themselves" at times (p. 5).
			Inadequate training	"Over 900 of the 1125 residents receive less than 50% of the services called for in their program plans" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
East Louisiana State Hospital	LA	1982	Inadequate medical and mental health care	pp. 2-4
Enid & Paul's Valley State Schools	OK	1983	Inadequate medical and mental health care	"Insufficient licensed physician coverage has resulted in serious harms to residents," contributing to patient deaths (p. 2-3).
			Inadequate training	Lack of training "contributes to and manifests itself in residents' aggressive and stereotypic behaviors * * * [such as] incessant disordered physical movements, headbanging, biting, hyperactivity, and assaultive behavior" (p. 5).
			Failure to provide reasonable supervision and safety	"For example, a group of 21 naked residents were observed being led to a shower area, where two staff sprayed the residents down with a large garden type hose" (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	p. 5
			Abuse of residents	Staff found "slapping, kicking, hitting, or spanking residents" while records also "reflect many instances of unexplained resident injuries" (p. 6).
			Unsanitary conditions	Lack of sanitation practices contributed to parasitic and bacterial infections requiring quarantine of entire living areas (p. 6).
Wheat Ridge Regional Center	CO	1984	Failure to provide reasonable supervision and safety	"Due to lack of staff, residents suffer neglect and numerous accidents and injuries. * * * [N]umerous residents have sustained injuries where the cause remains unknown. Resident on resident assaults are common; residents engaging in self-abusive behaviors are frequently unsupervised and

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				unattended. Residents have been found with unexplained broken bones and burns to the body. For example, one resident was found with a femur segment protruding through the skin" (p. 2). During tour, staff came upon "approximately 20 adult women being cared for by one person amid great disorder and confusion. Many of these women were partially undressed, one was urinating on the floor of the living area and several were engaging in self-abusive behavior" (p. 2).
			Inadequate medical and mental health care	"A large number of Wheat Ridge residents suffer from severe contractures of their limbs and other body deformities due to the absence of necessary physical and occupational therapy" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"One troublesome secondary effect of these immobilizing contractures due to lack of physical therapy is the dysfunctioning of the digestive system," which has apparently caused an "abnormally high percentage of Wheat Ridge residents to require pureed diets or gastroatomies for tube feeding" (p. 4).
Logansport State Hospital	IN	1984	Inadequate medical and mental health care	pp. 1-2
			Failure to provide reasonable supervision and safety	"Patients are not being adequately monitored and supervised to prevent suicidal behavior or patient-on-patient violence, to notice and correctly diagnose symptoms of serious, physical or psychiatric dysfunctions, to monitor treatment responses and drug reactions, or to determine appropriate and reasonably safe

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				modes of treatment for each patient" (pp. 2-3).
Manteno and Eglin Mental Health Centers	IL	1984	Inadequate medical and mental health care; Inadequate training; Unreasonable use of physical restraints	Lack of professional staff lead to "inappropriate uses of drugs and serious treatment errors which have resulted in physical danger to, or unnecessary physical or chemical restraint of, the involved patients" (p. 3). Patients are further "endangered by inadequate medical care relating to serious and sometimes debilitating or life-threatening drug side-effects" (p. 4).
			Failure to provide reasonable supervision and safety	"Units in the facilities are overcrowded to a point that makes it virtually impossible for staff to maintain control without regular and extensive use of physical and chemical restraints" (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unsanitary conditions	"Sanitation and maintenance in portions of the facilities are so inadequate as to present serious risks to patients of poisoning, infection, or disease" (pp. 4-5).
Northville Regional Psychiatric Hospital	MI	1984	Failure to provide reasonable supervision and safety; Abuse of residents	Large number of patient deaths under unusual circumstances, some associated with restraint practices (p. 3). A patient died after "a stranglehold was applied to him while he was being subdued. He reportedly lay on the seclusion room floor from 15-20 minutes before efforts were made to resuscitate him" (pp. 2-3). "Another patient also died due to strangulation, and his body showed signs of a beating" (p. 3). "A third patient allegedly died from injuries suffered in

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				a beating. Still another patient, who had expressed her fear for her safety to her psychologist on a Friday, died over the weekend. Her body allegedly was bruised and battered" (p. 3). Police found that another patient who had died in a seclusion cell "had contusions on his face and the back of his head" (p. 3). There have also been "numerous incidents of rape, assault and threat of assault, broken bones and bruises" (p. 3). A staff member was found to have had "sexual relations with three different patients in one night." Other patients were beaten by staff, "including one who was stripped, placed in seclusion and severely beaten by several attendants" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical and mental health care	Inadequate medical care contributed to several deaths and preventable suicides (pp. 3-4).
Fairview Training Center	OR	1985	Inadequate training	Training "is virtually non-existent" and "results in a serious level of self-injurious and aggressive behaviors" (p. 3).
			Unreasonable use of physical and chemical restraints	"[R]estraints are used at Fairview in lieu of training and for the convenience of staff," and were employed more than 2,000 times per month (p. 4).
			Failure to provide reasonable supervision and safety	Records showed "an alarmingly high number of injuries," such as 197 incidents of injuries in one month resulting from self-abuse or aggression. In one two-month period, there were 27 incidents of sexual abuse (p. 3 n.1). "[W]e observed numerous residents with open wounds, gashes, abrasions,

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				contusions, and fresh bite marks. Many other residents had deep scars and scabs from a long history of self-abuse or victimization" (p. 3). Due to inadequate supervision of residents with pica behavior (ingesting inedible objects), "[r]esidents have had to undergo surgery, sometimes on a repeated basis, to remove foreign objects or to relieve bowel and other obstructions caused by pica. Physicians at Fairview have indicated that some residents have had surgery so frequently that any more operations resulting from pica would jeopardize their lives" (p. 8).
			Inadequate medical and mental health care	Dangerous psychotropic medication practices (p. 7-8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"Seventy percent of residents institution-wide have gum disease" (p. 8).
			Unsanitary conditions	"Many of the cottages we toured smelled of urine and waste. Sewage backup in cottage basements, up to three feet high on the walls, is permitted to remain for days. * * * [A]n August 1983 random sample of Fairview residents revealed that 35% had pinworm infection, a parasite which is spread by fecal and oral routes in unclean environments" (p. 9).
Fort Stanton Hospital & Training School	NM	1985	Inadequate medical and mental health care	Facilities' sole physician wrote institution-wide prescriptions for prescription medications and powerful psychotropic medications, authorizing their use when nursing staff believes it necessary, in contravention of

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				professional standards and creating substantial risk to patients (p. 2).
			Unreasonable use of chemical restraints	Psychotropic drugs being used to restrain patients without any physician assessment for the need for such measures (p. 2.)
			Inadequate mental health care	"Many residents are subjected to potentially dangerous" prescriptions of multiple psychotropic drugs "without any medical justification" (p. 2)
Southbury Training School	CT	1985	Failure to provide reasonable supervision and safety	Low staffing levels lead to inadequate supervision, which permitted one resident to leave the facility and die of exposure; another was able to remove and hide a large knife (p. 10). In one cottage, staff compensate for low staffing level by placing "at least one resident in

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				restraints for up to 12 hours a day due to the staff's inability to monitor his activities" (p. 10).
			Inadequate medical and mental health care	Investigation found "dangerous medication interactions and errors, and found that acute medical problems, such as fractures and infections, frequently do not receive critically necessary follow-up treatment" (p. 3). Use of psychotropic medications substantially departed from professional standards, creating substantial health risks for patients (pp. 3-6).
			Inadequate training; Unreasonable use of physical and chemical restraints	Facility's failure to provide adequate training program resulted in "a dangerous reliance on the use of both physical and chemical restraint" (p. 6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Hinds County Detention Center	MS	1986	Inadequate medical and mental health care	County Jail was being used to house mentally ill persons awaiting civil commitment hearings or placement in a mental hospital for up to eleven days. At time of investigation, jail held 42 mentally-ill detainees (pp. 1-2). No mental health treatment was provided during period of confinement (p. 3). "Male mentally-ill detainees were confined * * * in a small cell designed to serve as the 'drunk tank.' Some of the detainees were placed in hand and leg irons" (p. 3).
Westboro State Hospital	MA	1986	Unsanitary conditions	"The smell and sight of urine and feces pervade not only the toilet areas, but ward floors and walls as well" (p. 3). "Bathrooms and showers were filthy. Living areas are

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				infested with vermin. There are consistent shortages of clean bed sheets, face cloths, towels and underwear. Open commodes with human waste in them were often found in rooms to which many patients in unclean geri-chairs are confined all day, including meal times" (p. 3). "[N]on-sterile techniques are used when changing patients' dressings and feeding tubes" (p. 3).
			Inadequate medical and mental health care	Patients' physical illnesses are often misdiagnosed as psychological problems, resulting in "increased dosages of potentially dangerous antipsychotic drugs" (p. 5). "Acutely life threatening illnesses * * * are also not detected appropriately or on a timely basis.* * *

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				[I]nappropriate and inadequate medical care preceded many of the[] deaths" reviewed during the investigation (p. 5). "Patients also frequently do not receive prescribed medications because the ward or pharmacy lacks adequate supplies" (p. 4).
			Unreasonable use of physical and chemical restraints	Facility used sedating drugs on elderly patients for no medically justifiable reason, but instead to control residents' behavior "subjecting vulnerable geriatric patients to the dangerous effects of inappropriate drug usage and overmedication" (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	pp. 7-8

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Kalamazoo Regional Psychiatric Hospital	MI	1986	Inadequate training; Unreasonable use of physical restraints	Inadequate staffing prevents the facility from providing treatment that could "reduce or eliminate unreasonable risks to [patients'] personal safety and the undue use of bodily restraint" (p. 2).
			Inadequate medical and mental health care	Facility fails to adequately monitor efficacy and side effects of potentially dangerous drugs, creating unjustifiable risk of "deleterious side effects, tardive dyskinesia, involuntary, abnormal muscle movements, akathisia, and parkinsonism" (p. 3).
Napa State Hospital	CA	1986	Failure to provide reasonable supervision and safety; Unreasonable use of physical and chemical restraints	Severe staffing shortages "result in patient management, in lieu of treatment, through the inappropriate use of seclusion, chemical restraint, and physical restraint" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Restraint practices "pose significant hazards to the personal safety of NSH patients" (p. 4).
			Inadequate medical and mental health care; Inadequate training	Certain medication practices at facility "violated all known standards of medical practice" resulting in great danger to patient safety (p. 2). There was no monitoring of drug side effects and several patients exhibited an "antipsychotic drug-induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 3). Facility failed to provide training programs adequate to protect patient safety and avoid need for restraint and seclusion (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Broadview, Cleveland & Warrensville Developmental Centers	OH	1987	Inadequate training; Unreasonable use of chemical restraints	In the absence of adequate training programs, "staff overuse psychotropic medication to control the behavior of residents" (p. 1).
			Inadequate mental health care	p. 2
Metropolitan Developmental Center	LA	1986	Inadequate medical and mental health care	"MDC employs antipsychotic medication primarily as a means of controlling behavior without proper [medical] justification." As a result, "[n]umerous residents demonstrated serious neurological side effects from sustained exposure to high doses of antipsychotic drugs" (p. 2). Facility had no program to monitor for serious, potentially irreversible side effects of these medications (pp. 2-3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Other residents "have been exposed to an extreme risk of drug-induced toxic poisoning by the absence of preliminary and periodic drug-level testing" (p. 3).
Belle Chasse State School	LA	1986	Inadequate medical and mental health care	Administration of psychotropic drugs substantially departed from professional standards. There was no program to detect "Tardive Dyskinesia" which is "an antipsychotic drug induced side effect, potentially irreversible, that may result in permanent physiological damage" (p. 2).
Montgomery Developmental Center	OH	1987	Inadequate medical and mental health care; Failure to provide reasonable supervision and safety	pp. 2-3

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Los Lunas Hospital and Training School	NM	1988	Inadequate training; Unreasonable use of chemical restraints	"[S]traightjackets and ammonia inhalants are used as a consequence for antisocial behavior. Restrained individuals are in some cases isolated in a room with a closed door out of sight of staff. This practice, absent adequate surveillance, places severely handicapped residents at great risk of injury and is not professionally justifiable" (p. 2). "Los Lunas staff are using physical restraints, isolation and punishment * * * to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, a woman was raped, developed peritonitis, and died (p. 3).
			Inadequate medical and mental health care	Facility provides almost no physical therapy to the large number of patients

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				with body deformities who need therapy "to prevent muscular or skeletal breakdown" (p. 3).
W.A. Howe Developmental Center	IL	1989	Inadequate training; Unreasonable use of physical and chemical restraints	"To control resident behavior, in lieu of professionally designed training programs, staff resort to chemical and physical restraints" (p. 3).
			Inadequate medical and mental health care	"Due to the lack of adequate medical supervision of patients, early signs of illness and disease go undetected and/or untreated" (p. 5).
			Failure to provide reasonable supervision and safety	Patient was dead on the floor of her room for some time before staff discovered her, after staff failed to perform scheduled room checks. Another patient strangled to death while left unsupervised in improperly-applied restraints.

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Another resident left unsupervised ran out of the front door and into traffic, where she was killed (pp. 6-7).
Great Oaks Center	MD	1990	Failure to provide reasonable supervision and safety; Inadequate training	Investigation found that inadequate supervision contributed to "an alarmingly high frequency of resident injuries" (p. 5). Inadequate training program "fails to reduce self-abusive, aggressive, and other maladaptive and inappropriate behaviors." "As a result of these problems, rocking, pacing, and aimlessly wandering residents were seen throughout the institution. Instances of self-abuse were not an uncommon sight; observed attempts to intervene appropriately were rare. Many residents were observed to have cuts, bruises and scrapes. Clearly,

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				many of the injuries may have been preventable with more effective programming and if more trained staff were available" (p. 3).
			Unreasonable use of physical and chemical restraints	"Staff resort to chemical and physical restraints to control residents' behavior, in lieu of professionally designed training programs" (p. 3).
			Inadequate mental health care	p. 4
			Abuse of residents	A number of staff had been disciplined or criminally charged for abusing patients (p. 5 n.1).
Hawaii State Hospital	HI	1990	Inadequate food, clothing and shelter	Staff at facility confirmed that there was often insufficient food; "Staff reported that patients are often wrapped in blankets and sheets due to the absence of adequate clothing"; inadequate items for basic personal hygiene (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unsanitary conditions	"[S]anitation is grossly inadequate. During a tour of [one unit] our consultants had to walk around numerous puddles of urine. * * * * Kitchen facilities exhibited signs of serious cockroach infestation and other unsanitary practices" (p. 3).
			Inadequate medical and mental health care	"[D]rug practices at HSH are seriously deficient and represent significant departures from generally accepted medical standards" (p. 3).
			Unreasonable use of physical and chemical restraints; Inadequate training	"In view of serious, chronic and facility-wide staffing shortages, HSH staff employ bodily restraints - physical restraints, seclusion, and chemical restraints - at an unjustifiably high level solely for their own convenience or in lieu of professionally designed treatment programs" (p. 5).

II. Investigations Subsequent To Enactment of the Americans with Disabilities Act

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Arlington Developmental Center	VA	1991	Failure to provide reasonable supervision and safety; unsanitary conditions	"In many units, there was a pervasive smell of urine. Residents in diapers were wet; often their clothes were soaked through with urine" (p. 3).
			Inadequate medical care	"[W]e observed young children, some as young as two, whose limbs were severely contracted" from lack of physical therapy. "Many residents were left unattended in cribs, with no efforts being made to move their limbs, position them, or to provide any real physical therapy services" (p. 3). "The penis of another resident, a paraplegic with an in-dwelling Foley catheter, was eroded throughout its entire length due to inadequate care and monitoring" (p. 3).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Inadequate medical care contributed to deaths of five residents in past six months (p. 4).
			Abuse of residents	pp. 3-4
			Inadequate training	pp. 8-9
Northern Virginia Training Center	VA	1991	Inadequate training; Unreasonable use of physical and chemical restraints	In part because of inadequate training programs, use of restraints was pervasive: "restraint is used so frequently that it appears to be the treatment of choice rather than a technique of last resort" (p. 4).
			Inadequate medical and mental health care	"Serious medical conditions and marked functional deterioration are not comprehensively evaluated or effectively treated" due to inadequate medical system (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Boswell Retardation Center	MS	1991	Inadequate training; Unreasonable use of physical and chemical restraints	"Boswell's staff are using restraints, isolation and punishment to control the behavior of residents in lieu of necessary training programs" (p. 2).
			Inadequate mental health care	pp. 3-4
			Unsanitary conditions	p. 5
Embreeville Center	PA	1991	Inadequate medical and mental health care	Delays in emergency medical care contributed to patient death (p. 2).
			Abuse of residents	Undercover agent observed repeated instances of abuse over nine-week period (p. 3).
			Inadequate training programs	p. 2
Agnews Developmental Center	CA	1991	Unsanitary conditions	"Clients and residents smelled of urine and feces" (p. 2).
			Unreasonable use of physical and chemical restraints	Bodily restraint and medication used in lieu of training programs or adequate staff supervision (pp. 4-5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical care	Investigation found "resident after resident whose legs had lost all muscle tone and whose hip, knee and ankle joints had become permanently fixed or cemented in place in a deformed frog-leg or windswept position due to months and even years of inactivity" (p. 2). "[I]nordinate delays in diagnosing and responding to serious resident illness" placed large population of medically fragile patients at substantial risk (pp. 5-6)
			Abuse of residents	Administrators "confirmed to us that staff abuse of residents is a serious problem" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Memphis Mental Health Institute	TN	1992	Inadequate medical and mental health care	Deficiencies in the facility's medical care system contributed to two recent deaths (pp. 5-6). Lack of psychiatrists leads to serious errors in diagnosis and medication prescription (pp. 7-8).
			Unreasonable use of physical and chemical restraints	"Patients at MMHI are subjected to both an undue amount of bodily restraint and dangerous restraint practices" (p. 9). "[S]taff members are placing patients inappropriately in physical restraints simply because they are confused or disoriented." Patients are also restrained while sedated, "a substantial departure from accepted standards of psychiatric care" (pp. 9-10).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Arizona State Hospital	AZ	1993	Unreasonable use of physical and chemical restraints	Patients "are routinely put into five-point restraints (a practice where a patient is restrained on a bed and bound by the ankles, by the wrists with the arms to the side, and by a strap across the abdomen) *and* placed into a locked seclusion room" for convenience of staff. Leaving a restrained patient unsupervised creates "great risk of harm from choking and asphyxiation" (p. 2).
Jones County Jail	MS	1993	Inadequate medical and mental health care	Mentally ill inmates, and mentally ill persons detained pending civil commitment proceedings, housed in five-by-six foot steel cage, sometimes for months (p. 4).
Chicago-Read Mental Health Center	IL	1993	Inadequate mental health care; Inadequate training	pp. 1-2

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical restraints	pp. 2-3
Sonoma Developmental Center	CA	1994	Failure to provide reasonable supervision and safety	"As a result of inadequate supervision, residents have been subjected to numerous, serious, unnecessary injuries" (p. 2). In one incident, a resident drowned in a bathtub while unattended (p. 2). In another, one resident was attacked by another with a knife (p. 2).
			Inadequate training	Training programs are inadequate and lead to harm from unaddressed behaviors and to the unnecessary and unreasonable use of physical and chemical restraints (pp. 4-6).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical care	Improper feeding practices for severely disabled residents "subject them to severe risk of choking, aspiration and aspiration pneumonia" (p. 3). "The lack of physical therapists and physical therapy services has led to the development of undue contractures, muscle atrophy, inappropriate body growth, and physical degeneration" (p. 3). "The failure of staff to properly maintain [tracheostomy] tubes subjects residents to the risk of death from suffocation and presents other significant health risks, including infection" (p. 3).
Southern & Central Wisconsin Developmental Centers	WI	1994	Failure to provide reasonable supervision and safety	Inadequate supervision has led to serious resident injuries. For example, one elderly resident with condition that creates great risk

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				of falling was taken to hospital for injury caused by a fall, where hospital staff noted that she had fallen 62 times that day (p. 10).
			Inadequate medical and mental health care	While facility has over 300 residents with seizure disorders, management practices are dangerously deficient; some patients kept on medications with strong and dangerous side effects for years after they are no longer necessary; some are kept on potentially dangerous drugs even though they are not helping. For example, one patient who had been seizure free for six years, was kept on medication even though lab results showed that dosage was too low to be having any effect and even though patient appeared to be suffering from dementia as a side effect of the drug (p. 3-4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Facility's use of psychotropic medications substantially departs from professional standards, exposing patients to unnecessary risks of dangerous side effects (pp.7-9).
			Inadequate training; Unreasonable use of physical restraints	pp. 10-13
Eastern State Hospital and Hancock Geriatric Center	VA	1994	Inadequate mental health care; Inadequate training; Unreasonable use of physical and chemical restraints	pp. 1-6
Clover Bottom Developmental Center	TN	1995	Failure to provide reasonable supervision and safety	Many injuries linked to lack of supervision; "in one seven month period, a resident received injuries on twenty-six occasions," half of which required stitches (pp. 3-4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training programs	pp. 5-8
			Inadequate medical and mental health care	"Residents languish in carts and ill-fitting wheelchairs, which exacerbate or allow physical deformities to progress - in some cases to a point that the deformity may preclude a person from sitting upright in a wheelchair" (p.12).
Fircrest Residential Habilitation Center	WA	1992	Failure to provide reasonable supervision and safety	"[R]esidents suffer needless serious injuries" due to lack of supervision, including an average of "410 incidents per month for some 440 residents" (p. 1). "Numerous residents were seen with fresh wounds and lacerations, including shaved spots on heads revealing stitches and healing injuries; red marks and significant bruises; multiple scabs and scars, and large bandages or casts" (pp. 1-2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"Our consultants observed residents engaged in self-injurious behavior, having seizures, masturbating in open view - all without staff intervention of any kind" (p. 2). "[O]ne resident was found dead in the day room of a living unit; the resident had been dead for up to three hours before her body was discovered by staff" (p. 2). Dangerous positioning and feeding practices risk the lives of many residents (p. 2).
			Inadequate training	"Due to a lack of human interaction and care, residents have developed significant stereotypic, maladaptive or anti-social behaviors" including "headbanging, eating foreign objects and pulling hair, to waving arms, flicking fingers and other self-

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				stimulatory activities" (p. 1). "Much of the anti-social, maladaptive behavior, injuries and use of restraints is attributable, in significant part, to the lack of * * * training programs" (p. 5).
			Unreasonable use of physical and chemical restraints	Physical restraints, including "staff incapacitating residents by holding them down involuntarily on the floor or elsewhere for a period of 'enforced relaxation'" were pervasively "used as punishment, for the convenience of staff and in lieu of training programs" (p. 4-5).
Forrest County Jail	MS	1993	Inadequate mental health care	"There are no mental health services available at the jail and the holding cells into which disturbed or mentally-ill * * * prisoners are placed pose a direct threat to their health and safety" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				"During the course of our tour of the jail, our consultants observed a severely mentally ill inmate, clad only in an undershirt, housed in the general population" where he had been waiting for several weeks for a transfer to a mental health facility. "He had allegedly eaten some glass and was prone to defecate on the floor of the cell" (pp. 2-3).
Nat T. Winston Developmental Center	TN	1995	Inadequate training; Unreasonable use of physical and chemical restraints	"NTWDC, because of the ineffectiveness of its behavioral programs, relies on physical and chemical restraints to control residents' behavior" (p. 3). Lack of training programs and supervision contribute to high incidence of injuries, including "multiple bites, lacerations, broken bones, bruises and abrasions. One individual was

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				injured 25 times * * * in an eight-month period. * * * Several residents were found attempting to cut themselves with knives or razorblades" (p. 4).
			Inadequate medical and mental health care	pp. 4-5
			Unsanitary conditions	"Sanitary conditions were very poor at the food facility"; "Mold and mildew were prevalent throughout the refrigerators and coolers" because of plumbing leaks (pp. 5-6).
Greene Valley Developmental Center	TN	1995	Inadequate medical and mental health care	"Due to an inadequate medical care delivery system * * * residents are subjected to needless fractures, recurrent aspiration, preventable weight loss, recurring seizures, avoidable injuries, and other direct threats to their health" (p. 2).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				Psychiatrists prescribing dangerous combinations of drugs "absent any rational justification in violation of medical standards" (p. 3).
			Failure to provide reasonable supervision and safety	Due to lack of supervision, residents "are repeatedly 'found with blood' on them from injuries that occur outside of staff supervision. On other occasions, residents' severe injuries are discovered only during bathing or at bedtime" (p. 5). "[O]ne eleven year old boy apparently lost the sight in one eye from repeated headslapping which resulted in a detached retina. Other residents were noted with swollen, disfigured features resulting from years of self-injury. Still others had permanent scars from

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				continual self-mutilation of their faces and arms" (p. 6).
			Inadequate training	Many residents' "destructive behaviors remain unaddressed" by training programs. "For example, one resident had large scratches on her face that had been self-inflicted; our consultant psychologist was informed that there was no program to modify or eliminate this unsafe behavior." The same was true of another patient who repeatedly reopened a wound on his face and one who had a history of pica for almost 20 years (p. 7).
Northern Virginia Mental Health Institute	VA	1995	Inadequate medical and mental health care	"[P]sychiatric care is grossly inadequate" and "poses direct threats to the health and safety of patients" (p. 3). "A county hospital is located only a few hundred yards

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				[away], yet there have been a number of well-publicized deaths which are linked to substantial delays in providing adequate medical care" (p. 4). "[O]ne patient died partly because of a toxic buildup of antidepressants in her body. Another patient died from meningitis after a psychiatrist requested that she be seen by an internist who failed to appear to assess her life-threatening condition" (p. 4).
			Unreasonable use of physical and chemical restraints	"Due to inadequate staffing, NVMHI is unable to provide one-on-one monitoring for many residents who are suicidal or are in restraints or seclusion and require such close supervision. Patients have been injured while being restrained and are then left unattended by medical personnel" (p. 5).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Failure to provide reasonable supervision and safety	"[T]he lack of supervision and care is so grave that patients have been subjected to severe harm, including death" (p. 5).
Northern Virginia Mental Health Institute	VA	1996	Failure to provide reasonable supervision and safety	Problems with supervision persist: in the past year, there were 70 incidents of patients escaping from the facility, and an average of 27 incidents of patient self-injury and another 17 incidents of patient-on-patient violence each month (p. 7). Patients repeatedly injured themselves even when "supposedly under careful supervision." "One patient committed approximately 12 such acts of self-injury while on 'special observation' status." "One patient somehow managed to obtain a knife while in the seclusion room" (p. 7).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	In some cases, "staff have resorted to calling the police and having patients arrested rather than addressing the underlying psychological issues" (p. 8).
Central State Hospital	VA	1997	Failure to provide reasonable supervision and safety	Lack of staffing and failure to supervise patients leads to repeated incidents of preventable injury and suicide attempts (pp. 3-5). One patient supposedly under 24-hour surveillance was found with 42 bruises over his body from unwitnessed incidents (p. 4).
			Inadequate medical and mental health care	pp. 5-7, 9-11

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	Facility's use of restraints substantially departs from professional standards (pp. 7-9). Patient died after being left in five-point restraint on bed as punishment; her psychiatrist had warned facility staff not to restrain her because of seizure risk. Nonetheless, the "patient had spent over 300 hours of the last two months of her life in restraints" (p. 8).
Landmark Learning Center	FL	1996	Failure to provide reasonable supervision and safety	pp. 3-4
			Inadequate training and mental health care	pp. 4-10
Harold Jordan Rehab. Center	TN	1996	Inadequate training and mental health care	pp. 3-4

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Los Angeles County Jail	CA	1997	Inadequate mental health care	Jail system housing approximately 1,700 mentally ill inmates provides virtually no treatment to most inmates other than medication (p. 8). Jail exacerbates many inmates' illness by placing them in solitary confinement for 23 hours or more per day (p. 12).
			Failure to provide reasonable supervision and safety	Jail places many mentally ill inmates in general population, but requires them to wear uniforms that designate them as mentally ill. As a result, many inmates suffered from beatings and sexual assaults (pp. 14, 17).
Centro de Reeducation para Adultos	PR	1997	Unsanitary conditions/ inadequate shelter	"Many of the buildings are dilapidated, decaying, and lack adequate plumbing and lighting." At one facility, "the showers do not work, the faucets do not work, and the toilets do not flush

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				properly. In order to bathe the clients, staff dump water from water tanks into large movable garbage cans from which the staff manually extract water using smaller buckets to pour it on the residents." Lack of water means that staff cannot wash hands after changing some patients' diapers (p. 3).
			Inadequate training and mental health care; Failure to provide reasonable supervision and safety	Investigators found patient "sitting on the floor * * * moaning to himself. We noticed a stream of blood trickling down his helmet. * * * * When the nurse removed his helmet, we discovered that [the patient's] head had been severely damaged due to years of self-abuse and head banging. [He] had butted and rammed his head into walls and post corners so often that he had pushed back completely his hair and skin on the front half of his

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				head." Nonetheless, "the Commonwealth has failed to provide [the patient] with professional psychological or behavioral services." Investigation found many other such individuals not receiving adequate care (p. 6). p. 4
			Unreasonable use of physical and chemical restraints	"Restraints are prevalent at many of the institutions * * * and are related lack of behavioral programming, training, and professional mental health intervention. * * * * [S]taff use a bed sheet to tie [a client's] waist and torso to a bench and to one of the iron bars at the facility to keep her from walking around the building and engaging in aggressive, maladaptive behaviors such as

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				biting and hitting other clients. Staff tie [another client] up in four-point restraints to her bed for the entire time she is menstruating" (p. 7)
Center for Integral Services	PR	1997	Failure to provide reasonable supervision and safety	"On our tour of CIS, we generally found a dangerous environment for the clients. We noticed many CIS residents with fresh injuries, including lacerations and bruises, as well as historical remnants of past injuries suffered at CIS, such as disfiguring scars. Many clients had suffered facial injuries or severe injuries on the back of their heads with resulting deep scars and hair loss" (p. 3). Parents of clients showed pictures of "son with a very swollen, bulbous, purple and black eye. The father told us that his son has suffered a host

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				of other injuries at CIS including a broken nose, a severe knee injury * * * and various head injuries, some requiring sutures." Another picture showed a client with a black eye, "a bloody left eye socket, bloody swollen lips, and a face marked with fresh lacerations. The mother reported that her son has also suffered a fractured arm, numerous lacerations, bites, broken teeth" and "is now limited in the use of his hands to one index finger and thumb on each hand" (p. 4).
			Inadequate food, shelter and sanitation	"[T]he facility runs out of food monthly" and "is in a state of disrepair." "Residents have to sleep on beds with old, worn mattresses that are dirty and often wet." Toilets do not flush. As a result, "virtually all of the toilets on the men's side had urine and/or

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				feces in them, producing a health hazard and an unpleasant, malodorous environment" (pp. 5-6). "Staff admitted to us that they routinely bathe the male clients by lining them up naked and hosing them down in groups * * * with a garden hose" (pp. 6-7).
			Abuse of residents	Facility administrator acknowledged problems with protecting clients from staff abuse and stated that "one CIS staff member had recently been convicted for sodomizing a client" (p. 3).
			Unreasonable use of physical and chemical restraints	"CIS frequently uses restraints as a substitute for meaningful activity during the day or for appropriate programs to address maladaptive behaviors * * * to control residents

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				they routinely use mechanical restraints, such as leather cuff belts (which are tied to the heavy metal beds around the limbs of the clients), restraint vests and straight jackets, and restraint nets" (p. 8).
			Inadequate medical and mental health care	Facility "routinely runs out of certain critical drugs" such as anti-convulsant medications for epileptic patients, who suffered repeated untreated seizures as a result (pp. 5, 10). "Most of the residents are put on psychotropic medication simply to control their behaviors without appropriate psychiatric assessments, diagnoses, treatment and monitoring" (p. 9).
			Inadequate training programs	pp. 7-9

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Hammond Developmental Center and Pinecrest Developmental Center	LA	1997	Failure to provide reasonable supervision and safety	Client went for weeks with an undetected fractured shoulder, even though obviously in pain and bruised (p. 6).
			Abuse of residents	Four staff members recently indicted for abusing residents, many other incidents of abuse documented by facility (pp. 4-5, 15-16).
			Unreasonable use of physical and chemical restraints	"A staff member left a client in full mechanical restraints unattended for hours in a room with a known aggressor" while staff watched television (p. 5). Failure to provide adequate training programs leads to some patients being in restraints virtually non-stop (p. 12). Failure to monitor clients in restraints led to injuries (p. 12-13).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	As a result of insufficient training programs, "residents' aberrant behaviors continue unabated, often get worse, and lead frequently to other destructive behaviors" (p. 10). Staff in one unit withheld food from clients if they misbehaved (p. 10).
			Inadequate medical and mental health care	pp. 13-15
Holly Center	MD	1998	Failure to provide reasonable supervision and safety; Inadequate medical care	Improper feeding techniques for severely disabled residents contributed to a constant rate of hospitalization and several deaths from choking and severe respiratory problems (pp. 3-5). Systemic inadequacies in medical care contributed to the recent death of a severely handicapped and retarded resident (pp. 7-8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate training	pp. 8-13
Davies County Detention Center	KY	1998	Inadequate mental health care	Jail provides no mental health services. "During our tour, we observed several acutely mentally ill individuals at the main jail, obviously in need of psychiatric evaluation and treatment, being left for days at a time in 'observation' - *i.e.*, in a cell by themselves. One inmate was observed singing for hours on end, and eating his own feces" (p. 11). As a result of inadequate mental health and suicide prevention system, a 15-year-old boy killed himself (p. 12).
New Castle Developmental Center	IN	1998	Failure to provide reasonable supervision and safety; Inadequate training	"Injuries are pervasive throughout the campus. With a census of 164 individuals, New Castle averaged over 1,000 resident injuries/incidents on a monthly basis";

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				over a four-month period, "88 percent of New Castle residents sustained injuries; 82 percent of the residents were injured more than one time during this period" (pp. 2-3). In a single month, one resident was assaulted 20 times and another was assaulted 19 times (p. 3). "Other injuries are unwitnessed by staff, including bone fractures, bloodied noses and body bruises" (p. 3). "[W]e witnessed instances in which residents engaged in aggressive and self-injurious behaviors (including head slapping, hand biting, eye gouging and table banging) without appropriate and timely staff intervention (p. 4).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Inadequate medical and mental health care	While half of residents have epilepsy, facility's seizure management practices dangerously depart from accepted medical practices, increasing risk of liver and permanent brain damage (pp. 5-6). Insufficient levels of nursing staff lead to failures to identify and treat serious medical problems (pp. 6-7).
Georgia Juvenile Facilities	GA	1998	Inadequate mental health care	Inadequate mental health care provided throughout State's juvenile detention facilities and training schools (pp. 9-11, 19-22). Many mentally ill youth "end up locked in security units where they spend large portions of their days isolated in small rooms with few activities. In these units, and elsewhere, they are often restrained, hit, shackled, put in restraint chairs for hours, and sprayed with [pepper

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				spray] by staff who lack the training and resources to respond appropriately to the manifestations of mental illness" (p. 20).
Western State Hospital	VA	1999	Inadequate medical and mental health care	Facility fails to identify and address mental health needs, leading to inadequate treatment and risk of harm. In one case, patient identified as suicidal was given no treatment to address suicidal urges and subsequently hanged himself in his room (pp. 3-4). Physicians are not permitted to prescribe some medically-indicated drugs for budget reasons (pp. 5-6). Inadequate medical care contributed to several recent deaths (p. 8).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
			Unreasonable use of physical and chemical restraints	Facility uses excessive and dangerous restraint techniques (p. 7).
			Failure to provide reasonable supervision and safety; Inadequate training	Combination of inadequate staffing and training for patients results in high level of violence and injuries. Within one 90-day period, the facility of 370 patients "recorded 169 altercations, 81 instances of self-injurious behavior, and 128 falls" as well as 8 suicide attempts and 13 escapes. In the recent past, one patient committed suicide and was dead for an hour before being discovered (p. 9).
Rainier School & Frances Haddon Morgan Center	WA	1999	Unreasonable use of physical and chemical restraints	"In 1998, Rainier logged many thousands of hours of restraint use, without demonstrating that less restrictive interventions were tried or that underlying behavioral support plans and services

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				were adequate." For example, the facility's response to patients attempting to eat inedible objects (pica) or digging at their eyes or rectums was to place patients in nearly constant restraints: one patient with pica behavior spent 2,000 hours in a restraint suit over a six-month period; another averaged 600 hours per month for pica and rectal digging; another averaged 22 hours per day in the suit for rectal digging (pp. 2-3).
			Failure to provide reasonable supervision and safety; Inadequate training; Inadequate medical and mental health care	"Without the necessary specialized treatment, * * * residents have suffered serious harm. Residents * * * have blinded themselves from chronic behaviors, such as eye poking and head banging, that the facilities have not addressed in accordance with accepted

Name of Facility	State	Year	Categories of Constitutional Violations	Details
				professional standards" (p. 7). Numerous incidents of unaddressed, dangerous behaviors, such as pica, head-banging, and eye-poking (pp. 7-8). In one facility, "approximately 20 percent of all Morgan residents were admitted to the emergency room or hospital, some on more than one occasion, for treatment of injuries" in a one-year period; during same year residents in another facility "suffered approximately 77 lacerations requiring sutures (32 involving the head), 37 bone fractures, 8 dislocated shoulders, and 2 incidents of finger amputation" (p. 10).

Name of Facility	State	Year	Categories of Constitutional Violations	Details
Clark County Detention Center	NV	1999	Inadequate mental health care	Jail failed adequately to identify mentally ill inmates and provide appropriate treatment, resulting in serious harm and suicides (pp. 5-6).

APPENDIX C

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SELECTED PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *et seq.*

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards

and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title II, Part A, of The Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities", and "communications", regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * * * *

Title II, Part B, of The Americans With Disabilities Act

§ 12141. Definitions

As used in this subpart:

(1) Demand responsive system

The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation

The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system

The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates

The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation

The term "public school transportation" means transportation by schoolbus vehicles of schoolchildren, per-

sonnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary

The term "Secretary" means the Secretary of Transportation.

§ 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990, and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Purchase and lease of used vehicles

Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Remanufactured vehicles

(1) General rule

Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Exception for historic vehicles

(A) General rule

If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to

meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) Vehicles of historic character defined by regulations

For purposes of this paragraph and section 12148(b) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

§ 12143. Paratransit as a complement to fixed route service

(a) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) Required contents of regulations

(1) Eligible recipients of service

The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying

the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) Service area

The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) Service criteria

Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) Undue financial burden limitation

The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to pro-

vide such services to the extent that providing such services would not impose such a burden.

(5) Additional services

The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) Public participation

The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) Plans

The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) Provision of services by others

The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) Other provisions

The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) Review of plan

(1) General rule

The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) Disapproval

If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) Modification of disapproved plan

Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secre-

tary, and commence implementation of, such modified plan.

(e) "Discrimination" defined

As used in subsection (a) of this section, the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) Statutory construction

Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

§ 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

§ 12145. Temporary relief where lifts are unavailable

(a) Granting

With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufac-

turer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress

Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application

If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall—

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

§ 12146. New facilities

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 12147. Alterations of existing facilities

(a) General rule

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the

facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations. Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility

Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(B) Extension for extraordinarily expensive structural changes

The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones

The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

§ 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities

(1) In general

With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) Exception

Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(b) of this title (relating to key stations).

(3) Utilization

Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule

(1) General rule

Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system,

for purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) Historic trains

In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

§ 12149. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart (other than section 12143 of this title).

(b) Standards

The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this part. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers

Compliance Board in accordance with section 12204 of this title.

§ 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

* * * * *

§ 12161. Definitions

As used in this subpart:

(1) Commuter authority

The term "commuter authority" has the meaning given such term in section 502(8) of Title 45.

(2) Commuter rail transportation

The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in section 502(9) of Title 45.

(3) Intercity rail transportation

The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) Rail passenger car

The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) Responsible person

The term "responsible person" means—

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) Station

The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

§ 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New intercity cars

(A) General rule

Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a

person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Special rule for single-level passenger coaches for individuals who use wheelchairs

Single-level passenger coaches shall be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair,

only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs

Single-level dining cars shall not be required to—

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs

Bi-level dining cars shall not be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or

(iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have on each train which includes one or more single-level rail passenger coaches—

(i) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 5 years after July 26, 1990; and

(ii) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) Location

Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) Limitation

Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) Other accessibility features

Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to

be entered from the station platform by an individual who uses a wheelchair.

(4) Food service

(A) Single-level dining cars

On any train in which a single-level dining car is used to provide food service—

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if—

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adjacent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) Bi-level dining cars

On any train in which a bi-level dining car is used to provide food service—

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) Commuter rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New commuter rail cars

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Accessibility

For purposes of section 12132 of this title and section 794 of Title 29, a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require—

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) Used rail cars

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29, for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a

used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) Remanufactured rail cars

(1) Remanufacturing

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Purchase or lease

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) Stations

(1) New stations

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secre-

tary of Transportation in regulations issued under section 12164 of this title.

(2) Existing stations

(A) Failure to make readily accessible

(i) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a responsible person to fail to make existing stations in the intercity rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) Period for compliance

(I) Intercity rail

All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) Commuter rail

Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of

Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) Designation of key stations

Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) Plans and milestones

The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) Requirement when making alterations

(i) General rule

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part

thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) Alterations to a primary function area

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) Required cooperation

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with

respect to such station in that responsible person's efforts to comply with such subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

§ 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this subpart shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 12204(a) of this title.

§ 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

§ 12165. Interim accessibility requirements

(a) Stations

If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be readily accessible to and usable by persons with disabili-

ties as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) Rail passenger cars

If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162(a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this subpart and are in effect at the time such design is substantially completed.

Title IV of The Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[2] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

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[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible

Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preservation Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 12206. Technical assistance

(c) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Communications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance

The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I

The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) Subchapter II

(i) Part A

The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B

The Secretary of Transportation shall implement such plan for assistance for part B subchapter II of this chapter.

(C) Subchapter III

The Attorney General, in coordination with Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV

The Chairman of the Federal Communications Commission, in coordinate with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applica-

ble final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts

(1) In general

Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit or any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities organized for profit, but such entities may not be the recipients or[1] grants described in this paragraph.

(2) Dissemination of information

Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance

An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section,

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[1] So in original. Probably should be "of".

including any failure in the development or dissemination of any technical assistance manual authorized by this section.

§ 12207. Federal wilderness areas

(a) Study

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 *et seq.*).

(b) Submission of report

Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access

(1) In general

Congress reaffirms that nothing in the Wilderness Act [16 U.S.C. 1131 et seq.] is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined

For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-

impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of the Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[1]

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

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1 So in original. The comma probably should not appear.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in

this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not

impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.